Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1310

RUSSELL LEE EPPERSON,
Petitioner,

v.

STATE OF MISSOURI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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STATE OF MISSOURI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

The Petitioner, RUSSELL LEE EPPERSON, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the Supreme Court of Missouri, entered in this case on September 12, 1978, and made final by Order of the Supreme Court of Missouri denying Petitioner's Motion for Rehearing, entered on October 10, 1978.

OPINIONS BELOW

The opinion of the Supreme Court of Missouri, filed September 12, 1978, is reported at 571 S.W.2d 260 (Mo. 1978) (en banc) and is printed as Appendix B. The Order of the

Supreme Court of Missouri denying Petitioner's Motion for Rehearing is unreported, and is printed as Appendix C. The opinion of the Missouri Court of Appeals, St. Louis District, filed July 26, 1977, is unreported, and is printed as Appendix D.

JURISDICTION

The judgment of the Supreme Court of Missouri was entered on September 12, 1978. A timely Motion for Rehearing was denied on October 10, 1978. Mr. Justice Blackmun extended the time for filing a Petition for a Writ of Certiorari to and including February 23, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Was warrantless entry into Petitioner's home justified under the emergency exception to the Fourth Amendment warrant requirement where the police did not know whether the circumstances required emergency action, their further preliminary investigation failed to convince them of the need for an urgent response, and they waited over two hours before making a forcible entry?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution, Section I, provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Facts and Circumstances Surrounding the Entry and Search

This Petition arises out of the warrantless entry into and search of Petitioner's home in Mexico, Missouri, on March 26, 1975.[1] On that date, shortly after 9:00 a.m., Mrs. Harold Smith contacted the Mexico Department of Public Safety (Police) concerning the whereabouts of her daughter, Fern Epperson, who was also Petitioner's wife. Officer William Schindler was dispatched to interview Mrs. Smith about a missing person report.

Mrs. Smith told Schindler that she had not seen or heard from her daughter in two days, which was unusual, and that she was concerned that something may have happened between Fern and her husband (63). She related that by prearrangement, Russell Epperson, the Petitioner, had picked her up at about 9:00 that morning and driven her to his residence to await the arrival of Fern. When they entered

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[1] References will be to pages of the transcript of the hearing on the Motion to Suppress Evidence, held May 21, 1975. *See* Appendix A at 1a-4a.

Petitioner's home, he explained that Fern had not yet arrived, however, Mrs. Smith noticed Fern's only pocket book, without which Fern never left home. Mrs. Smith also thought that Petitioner was behaving strangely, so she made an excuse and promptly left. Mrs. Smith claims to have told Schindler that, "I feel like there was death, because of the odor, but I wasn't certain" (92). Officer Schindler, however, denied that he had been told about any unusual odor in Petitioner's home (80).

The interview lasted ten to fifteen minutes, during which time Mrs. Smith was crying and at times incoherent (65-66). At its conclusion, Officer Schindler contacted a superior, Sergeant Richard Duffner, and requested the Sergeant to meet him in the vicinity of Petitioner's home. Upon meeting Duffner, Schindler related the nature of his interview with Mrs. Smith. Both officers then proceeded to the Epperson residence.

After arriving at the house, Duffner and Schindler knocked on the doors, but received no response. They then attempted to look through the windows, but were unsuccessful, the blinds being shut and the draperies drawn. A second check on the doors revealed all were locked. Sergeant Duffner then questioned Petitioner's next-door neighbor, who told him where Petitioner and his wife were employed, and identified the school attended by their oldest child. Instructing Schindler to remain at the house "in case any member of the family returned home" (68), Sergeant Duffner left the area.

Duffner first visited Fern Epperson's job, where he learned that she was on a week's vacation and had missed her weekly bowling date. He then returned to the police station and telephoned Petitioner's employer, who told him Epperson had been in briefly the previous day to state that he was

taking his wife to the hospital. A call by Duffner to the family's physician revealed that he had not seen Petitioner or his wife for three months. Finally, Duffner placed a call to the school attended by Petitioner's son, and was informed that Petitioner had called the day before and reported that his son was sick.

Duffner returned to the house and conferred briefly with Schindler. He then drove back to the police station to discuss the situation with the Chief of Police. Duffner's conversation with the Chief centered on gaining entry into the house (40), but they never discussed the possibility of seeking a search warrant (54). Instead, the Chief told Duffner that he and Schindler were not to break into the house (55), but should contact Petitioner's parents and "see if we can arrange it from there" (13). Duffner then telephone Petitioner's parents, who agreed to meet him at Petitioner's home.

At the house, Petitioner's mother and father tried to arouse someone inside by knocking and calling out. Epperson's father refused to break into the house (35), and after pointing out that his son's motorcycle was not in the garage, he and his wife left. Duffner and Schindler also departed, proceeding once again to the police station. After Schindler determined that Petitioner's motorcycle was at his place of employment, the two officers had another conference with Chief of Police Bolli. Again, no mention was made of a search warrant (54). The Chief suggested that the officers try to get Petitioner's father to break in, but told Sergeant Duffner that "we probably wouldn't find anything in the house, and the people had perhaps just left town for some reason or other" (57).

Following up on Chief Bolli's suggestion, the officers again contacted Mr. Epperson, who agreed to meet them

at Petitioner's house. At this point, Sergeant Duffner was not alarmed, but simply "curious" (52), since as he admitted, "it is not unusual that people don't answer their door and that the blinds were closed" (52). In the Sergeant's words:

> . . . I really didn't know what I had. I didn't know – I knew the circumstances, that Russell Epperson and his wife were gone, and as far as I was concerned, I was just looking to try to find them to see if they had skipped the country or they were injured or what. I didn't really know what I had. I mean there was no indication further to my prior investigation of any foul play involved of anything. As far as I knew they were just gone wherever they went; I couldn't tell. (49-50.)

Officer Schindler was similarly unalarmed (82, 83), his state of mind being one of unfocused suspicion (81-82). He did not necessarily suspect injury or foul play (83), but "just wanted to locate somebody . . . to be able to find the whereabouts of Mrs. Epperson and the children" (84).

Nevertheless, upon meeting the senior Mr. Epperson back at Petitioner's house, the officers, acting in concert with Mr. Epperson, obtained a ladder, unscrewed a storm window on the second story, raised the inside window, pulled back the blinds, and entered the room where they discovered the bodies of Fern Epperson and her two children. Petitioner's home was entered at approximately 11:50 a.m., about two and one-half hours after the initial report.

Following discovery of the bodies, a thorough search of the premises was made and a number of items seized by the police, including a chisel wrapped in towels and a bottle of chloroform. Later autopsies determined that the victims had been struck with a blunt instrument and chloroformed. Numerous photographs were taken and diagrams made. These items, and the results of tests performed on the items, were later offered into evidence against the Petitioner.

Judicial Proceedings

Ten days after the search of his home, Petitioner surrendered to the authorities and was charged with three counts of murder in the first degree. A preliminary hearing was held on April 15, 1975, at which time Petitioner first objected to the legality of the search by filing a Motion to Suppress (See Appendix A, 2a). The Motion was overruled and Petitioner was bound over for trial in the Circuit Court of Audrain County, Missouri.

In the Circuit Court, Petitioner again challenged the legality of the warrantless search of his home by way of a Motion to Suppress filed on May 9, 1975 (Appendix A, 2a-3a). An evidentiary hearing was held on the Motion on May 21, 1975 (Appendix A at 3a), and the Motion was taken under advisement. On June 27, 1975, in a one-line Order, the Court overruled Petitioner's Motion (Appendix A at 4a).

Subsequently, Petitioner moved for and was granted a change of venue to the Hannibal Court of Common Pleas in Hannibal, Missouri. Prior to trial, the Petitioner sought a rehearing on his Motion to Suppress, but the request was denied. The trial commenced on January 12, 1976. During the trial, Petitioner's counsel objected to the admission of numerous items of evidence on the ground that they were obtained by an illegal search and seizure. He also sought to renew his Motion to Suppress. The Court overruled the objections and again refused to reopen the Motion. Various items seized from Petitioner's house and testimony derived therefrom were admitted into evidence against him.

Petitioner offered no evidence in his own behalf at trial, and on January 14, 1976, the jury returned verdicts of guilty on each of the three counts of first-degree murder, and sentenced Petitioner to life imprisonment on each count. A Motion for New Trial was filed on Petitioner's behalf, raising, *inter alia*, the Court's refusal to suppress items and testimony obtained as a result of the warrantless search of Petitioner's home. On February 25, 1976; the Motion for New Trial was overruled, and the Court entered Judgment, imposing a life sentence on each count and ordering that the sentences run consecutively (Appendix A at 4a-5a).

From this Judgment, Petitioner noted an appeal to the Missouri Court of Appeals, St. Louis District (Appendix A, 6a). In an unpublished opinion filed July 26, 1977 (Appendix D), the Court of Appeals suggested affirmance, but determined that the case required resolution of issues involving an original construction of the Fourth Amendment to the United States Constitution and its Missouri counterpart.[2] In these circumstances, the case fell within the exclusive jurisdiction of the Supreme Court of Missouri. Accordingly, it was ordered transferred to that Court without a final decision by the Court of Appeals.

Sitting *en banc*, the Supreme Court of Missouri affirmed Petitioner's conviction, with one Judge dissenting. The Court concluded that the entry into Petitioner's house without a warrant fell within the "emergency" or "need for help"

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[2] The Court of Appeals indicated that much of the evidence seized would be admissible under the "murder scene exception" to the Fourth Amendment warrant requirement. Appendix D at 50a-51a. Since the Supreme Court of Missouri had not previously adopted this "exception", the case was ordered transferred to the State Supreme Court. While the case was pending decision, this Court rejected the "murder scene exception" in *Mincey v. Arizona*, ___U.S. ___, 98 S. Ct. 2408 (1978).

exception to the warrant requirement,[3] and was therefore permissible (Appendix B at 14a-16a). It also held that the facts known to the police at the time of entry were sufficient to justify the officers' initial entry into Petitioner's home (*Id.* at 18a), and that the subsequent search was within the scope of the "emergency" exception as well (*Id.* at 25a).

Judge Seiler, in dissent, took the position that the entry could not be justified on the grounds of an emergency, since the police delayed two and one-half hours before entering the premises (*Id.* at 31a). He noted the absence of any suggestion that a "warrant could not easily and conveniently been obtained" (*Id.* at 34a), and set forth his disagreement with the majority rather succinctly:

> If the police are confronted with an emergency they should act. If they choose to delay then they should obtain a search warrant. They should not be permitted both to delay and to dispense with a search warrant. That is not what is called for by the Fourth Amendment. (Appendix B at 32a).

Petitioner timely moved for rehearing before the Supreme Court of Missouri. His Motion was denied on October 10, 1978 (Appendix C).

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[3] The Supreme Court of Missouri had previously recognized the "emergency" exception in *State v. Sutton*, 454 S.W.2d 481 (Mo. 1970) (en banc). Missouri's application of this doctrine under the circumstances of *Sutton* was ruled unconstitutional in *Root v. Gauper*, 438 F.2d 361 (8th Cir. 1971).

REASONS FOR GRANTING THE PETITION

1. The entry into and earch of Petitioner's home involves the yet unresolved issue of where the balance is to be struck between two of our society's most fundamental values: the sanctity of the home and the rendering of aid to citizens whose life or health is threatened. In simple terms, the question here is whether the police may dispense with a warrant and break and enter a private citizen's home for the purpose of preventing injury or death when they do not perceive the necessity for immediate action on their part. More generally stated, the issue is when may a warrantless and forcible entry be made into a private dwelling based on a need to render assistance.

The Supreme Court of Missouri's holding validating entry into Petitioner's house without a warrant, although the officers perceived no need for immediate action and had ample opportunity to secure a warrant, illustrates the confusion extant in the federal and state courts over the nature and scope of the "emergency" exception to the Fourth Amendment warrant requirement. A call for assistance in avoiding injury or death is among the most frequently occurring incidents of police work. It is also a situation which often requires an immediate determination by the officer on the scene. For these reasons, this Court should take this opportunity to supply meaningful guidelines to those who must make such judgments.

2. Although this Court has on occasion referred to the right of police to make a warrantless entry and search in response to the belief that a person is in need of immediate aid, *Mincey v. Arizona*, ___ U.S. ___, ___, 98 S. Ct. 2408, 2413-14 (1978),[4] "[n]o emergency life-saving exception to

[4] *See McDonald v. United States*, 335 U.S. 451, 454-46 (1948); *Johnson v. United States*, 333 U.S. 10, 14-15 (1948).

the Fourth Amendment's warrant requirement . . . [has] been spelled out in any Supreme Court case up to this point." *United States v. Dunavan*, 485 F.2d 201, 203-4 (6th Cir. 1973). Nevertheless, the "emergency" exception has received wide recognition in state and federal cases. *Mincey v. Arizona, supra*, ___ U.S. ___, 98 S. Ct. 2413-14, ns. 6 & 7. The lack of specific parameters drawn by this Court is in apparent contradiction with the often repeated axiom that exceptions to the requirement of a warrant are ". . . specifically established and well-delineated." *Katz v. United States*, 389 U.S. 347, 357 (1967).

3. As generally recognized in the lower courts, the emergency doctrine constitutes an exception to the Fourth Amendment warrant requirement which permits police officers to "enter a dwelling without a warrant to render emergency aid and assistance to a person whom they reasonably believe to be in distress and in need of that assistance."[5] *Root v. Gauper*, 438 F.2d 361, 364 (8th Cir. 1971).

Under established principles justifying exceptions to the warrant requirement, failure to obtain a warrant in the case of police intrusion into a dwelling is excused only upon the existence of both probable cause to enter, and "exigencies of the situation . . . [which make] that course imperative." *Warden v. Hayden*, 387 U.S. 294, 298 (1967). Probable cause alone, no matter how strong, is insufficient to justify a warrantless entry into a dwelling. Thus, this Court has stated:

[5] The "emergency doctrine" has also been invoked in situations which do not fall within this definition. *E.g., United States v. Goldenstein*, 456 F.2d 1006 (8th Cir. 1972), *cert. denied*, 416 U.S. 943 (1974). In fact, every exception to the requirement of a warrant before a dwelling is searched can be said to derive from an emergency. *See Vale v. Louisiana*, 399 U.S. 30, 35 (1970); *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967).

> Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause. *Agnello v. United States,* 269 U.S. 20, 33 (1925).

That is not to say that when the police find probable cause they may not enter a dwelling, rather it simply evidences the Fourth Amendment requirement that probable cause judgments be made in the first instance by "a neutral magistrate." *Mincey v. Arizona, supra,* ___ U.S. at ___, 98 S. Ct. at 2415; *Camara v. Municipal Court,* 387 U.S. 523, 532 (1967).

The sole instance in which the decision to intrude into a dwelling is left to the discretion of the official in the field is when there exists a "compelling need for official action and no time to secure a warrant." *Michigan v. Tyler,* ____ U.S. ___, 98 S. Ct. 1942, 1950 (1978). Only when "the burden of obtaining a warrant is likely to frustrate the government purpose behind the search" may the police make a warrantless entry even where probable cause exists. *Camara v. Municipal Court, supra* at 533. Thus, approval of a warrantless entry into a man's home must turn upon an analysis of two separate factors: first, the existence of probable cause to enter the particular dwelling; and second, the existence of exigent circumstances sufficient to dispense with the warrant requirement. *Coolidge v. New Hampshire,* 403 U.S. 443, 474-75 (1971).

It is our submission that this same two-part analysis must be applied in situations in which the police, with benevolent motives, forcibly enter a dwelling to render emergency aid and assistance. The failure thus far of this Court to clarify

the parameters of this "emergency" exception has resulted in substantial confusion in the lower courts.

The opinion of the Missouri Supreme Court in the instant case reflects this problem. While going to great lengths to establish the existence of probable cause to enter Petitioner's home, the decision fails to recognize that a warrant may not be dispensed with absent the compelling need for immediate action. The Court nowhere analyzes this second factor of the warrant exception. Instead, from the opinion, it would appear that the mere incantation of the word "emergency" obviates the need to establish that an "exigency" indeed existed. Such truncated analysis is pervasive among decisions in this area,[6] and necessitates clarification by this Court so that the emergency exception will "not be permitted to swallow the rule: in the absence of a showing of *true necessity* – that is, an imminent and substantial threat to life, health, or property – the constitutionally guaranteed right to privacy must prevail." *People*

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[6] *See, e.g., State v. Nichols,* 20 Wash. App. 462, 581 P.2d 1371 (1978); *People v. Sutton,* 65 Cal.3d 341, 134 Cal. Rptr. 921 (Ct. App. 1976); *People v. Lovitz,* 39 Ill. App. 3d 624, 350 N.E.2d 276 (1976), *cert. denied,* 434 U.S. 842 (1977); *People v. Clayton,* 34 Ill. App. 3d 376, 339 N.E.2d 783 (1975); *State v. Hardin,* 90 Nev. 10, 518 P.2d 151 (1974); *State v. Sutton,* 454 S.W.2d 481 (Mo. 1970), *rev'd sub nom., Root v. Gauper,* 438 F.2d 361 (8th Cir. 1971) (*aff'g* District Court's grant of habeas corpus); *Patrick v. State,* 227 A.2d 486 (Del. 1967). In each of these cases, the failure to analyze the "exigency" aspect of the "emergency exception" resulted in the application of what was essentially a "murder scene exception" of the kind struck down by this Court in *Mincey v. Arizona, supra.* It is instructive to note that the lower court opinion in the case at bar relied principally on the murder scene exception in upholding the intrusion into Petitioner's home. *See* Appendix D. The Missouri Supreme Court acknowledged and attempted to distinguish *Mincey.* Appendix B at 24a.

v. Smith, 7 Cal. 3d 282, 285, 496 P.2d 1261, 1264, 101 Cal. Rptr. 893, 896 (1972) (emphasis in original).

4. The failure of many courts to recognize the necessity of employing a full Fourth Amendment analysis to situations arising under the "emergency exception" has also reduced their ability to provide the policeman on the street with definitive guidelines for the proper response in situations where the existence of an emergency is less than clear.

Where obvious circumstances require the policeman "to enter a burning home to rescue occupants or extinguish a fire, to prevent a shooting or to bring emergency aid to an injured person," the authority of the police to break and enter is plain and little additional guidance is needed. *Wayne v. United States*, 318 F.2d 205, 212 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963) (Burger, J. concurring). However, in a great number of instances – perhaps a majority – the circumstances that confront the policeman are not so distinct as those posited by Chief Justice Burger in *Wayne*.[7] Often the policeman, like Officer Schindler, Sergeant Duffner, and Chief of Police Bolli in the instant case, are confronted with at best the possibility of an emergency which initially, and even after preliminary investigation,[8] remains ambiguous. In these situations, a decision by this Court emphasizing the

[7] By way of example, Judge Seiler noted in his dissent in the instant case that "a search for missing persons, while a serious matter, is not *per se* an emergency of the kind under discussion. . . . " Appendix B at 32a-33a. *See People v. Smith, supra.*

[8] We do not advocate that a policeman who lacks the precise level of information necessary to act must simply shrug his shoulders and walk away. It is our position, however, that when "an intermediate response" fails to convince the police of the need for immediate action, *see Adams v. Williams*, 407 U.S. 143, 145 (1972), the next appropriate step is to seek a warrant.

primacy of the warrant requirement in the absence of clear-cut evidence of an emergency, would supply a decisive clarification. Indeed, in the instant case, where "[t]he magistrate, the circuit judge, and the prosecutor were close at hand,"[9] had the police sought a warrant, entry into Petitioner's home would doubtless have been accomplished much more quickly.

As this Court recognized in *Camara v. Municipal Court, supra* at 533:

> In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant . . . .

Despite what may be benign motives of the police in emergency situations, warrantless entry into a home, the place "ordinarily afforded the most stringent Fourth Amendment protection," *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976), constitutes the most serious invasion of the very site where "the expectation of privacy" is greatest. *See, e.g., South Dakota v. Opperman*, 428 U.S. 364, 367 (1976). It is for these reasons this Court has previously held that:

> In a doubtful case, when the officer does not have clearly convincing evidence of the immediate need to search, it is most important that resort be had to a warrant, so that the evidence in the possession of the police may be weighed by an independent judicial officer, whose decision,

[9] Appendix B at 34a (Seiler, J., dissenting).

not that of the police, may govern whether liberty or privacy is to be invaded. *Jones v. United States*, 362 U.S. 257, 270-71 (1960).

The problem of a policeman's responsibilities in the face of a potential emergency is one which arises often in law enforcement, and the difficulties are real. We submit that the Court should resolve this dilemma by addressing itself to the instant case.

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to review the judgment and opinion of the Supreme Court of Missouri.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 1979, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the office of the Attorney General of the State of Missouri, Attention: Paul R. Otto, Esquire, Assistant Attorney General, Supreme Court Building, Jefferson City, Missouri 65101, Counsel for the Respondent. I further certify that all parties required to be served have been served.

/s/ Thomas A. Guidoboni

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Counsel for Petitioner

APPENDIX

APPENDIX A

IN THE MISSOURI COURT OF APPEALS
ST. LOUIS DISTRICT

STATE OF MISSOURI, Respondent,	)	
vs.	)	No. 37929
RUSSELL LEE EPPERSON, Appellant.	)	

IN THE HANNIBAL COURT OF COMMON PLEAS
Honorable James R. Reinhard, Judge

STATE OF MISSOURI, Plaintiff,	)	
vs.	)	No. 5133
RUSSELL LEE EPPERSON, Defendant.	)	

TRANSCRIPT ON APPEAL

Mr. Thomas I. Osborne, Prosecuting Attorney, Audrain County, Court House, Mexico, Missouri, and

Mr. Ronald R. McKenzie, Prosecuting Attorney, Marion County, Tower Plaza, Clinic Road, Hannibal, Missouri,
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* * *

(Under date of May 9, 1975, the following entry appears of record in the office of the Clerk of the Circuit Court of Audrain County, Missouri:)

May 9, 1975. Now on this day comes the defendant herein by counsel and files Motion to Suppress and Notice to Thomas I. Osborne Prosecuting Attorney that the above Motion will be called on Wednesday, May 21, 1975, at 10:00 A.M., in the above entitled cause.

- - - -

(Said Motion is as follows:)

MOTION TO SUPPRESS

The defendant for his motion states:

1. That he was arrested on April 4, 1975, and was subsequently charged, in this case, with three (3) counts of first degree murder.

2. That on April 15, 1975, a preliminary hearing was held, on the said charges and the defendant was bound over for trial in the Circuit Court.

3. That at the time of the preliminary hearing, the defendant filed a MOTION TO SUPPRESS, and the motion was taken up, in conjunction with the preliminary hearing, and the motion, was overruled by the Magistrate Judge.

4. That prior to the time the defendant was arrested, various law enforcement officers of the State of Missouri, conducted a warrantless search of the defendant's home, and during the course of the said search three (3) dead bodies were discovered along with numerous items of evidence. In conjunction with the search, pictures were taken and various items of evidence were sent off to the Highway Patrol Laboratory and a laboratory at the University of Missouri, so that various tests could be conducted upon the said evidence.

5. The search of the defendant's home was unlawful and unreasonable and the seizure of the various items of evidence from the defendant's home was also unlawful and unreasonable, in that the arresting officer did not have a search warrant nor did the persons acting at the arresting officer's request and as their agents.

WHEREFORE, the defendant prays the Court to enter an order suppressing and barring as evidence all photographs taken as a result of the search of the defendant's home on the 26th day of March, 1975, and for a further order suppressing and barring from evidence all testimony of witnesses which relates to any facts and circumstances discovered as a result of the search in the defendant's home, and for a further order suppressing and barring from evidence any and all items removed from the home of the defendant and any and all tests performed upon the said items or any bodies or parts of bodies which may have been tested.

FILED: May 9, 1975.

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(Under date of May 21, 1975, the following entry appears of record in the office of the Clerk of the Circuit Court of Audrain County, Missouri:)

May 21, 1975. Comes State by Prosecuting Attorney. Comes Defendant in person and in custody of Sheriff and with self-selected counsel, David V. Bear, III. Defendant's motion to suppress presented. Evidence adduced. Motion argued, submitted and taken under advisement. Court Reporter directed to transcribe summations and argument of counsel and fees for same ordered taxed as costs as provided in 485.100. (Initialed GPA.)

* * *

(Under date of June 27, 1975, the following entry appears of record in the office of the Clerk of the Circuit Court of Audrain County, Missouri:)

June 27, 1975. Defendant's Motion to Suppress overruled.

* * *

(Under date of February 25, 1976, the following entry appears of record in the office of the Clerk of the Hannibal Court of Common Pleas:)

February 25, 1976 – Comes now Prosecuting Attorneys of Audrain and Marion County, Missouri. Comes defendant in custody of Sheriff and with his attorney by choice. Defendant's motion for new trial is argued and the Court overrules defendant's motion for a new trial.

The Court informs defendant as follows:
"Russell Lee Epperson, the Court informs you of the verdicts of the jury returned on January 14, 1976: As to Count I finding you guilty of Murder in the First Degree and fixing your punishment at life imprisonment by the Department of Corrections; As to Count II finding you guilty of murder in the First Degree and fixing your punishment at life imprisonment by the Department of Corrections; As to Court III "finding you guilty of murder in the First Degree and fixing your punishment at life imprisonment by the Department of Corrections. Do you have any legal cause to show why judgment and sentences should not now be pronounced against you?"

The court hearing no legal or sufficient cause, judgment is entered in accordance with the verdicts of the jury as to Count I, Count II, and Count III. As to Count I defendant is sentenced to be committed to the State Department of Corrections to serve a term during his natural life for the offense of Murder in the First Degree; As to Count II defendant is sentenced to be committed to the State Department of Corrections to serve a term during his natural life for the offense of Murder in the First Degree. The sentence as to Count II shall be consecutive to that one in Count I; As to Count III defendant is sentenced to be committed to the State Department of Corrections to serve a term during your natural life for the offense of Murder in the First Degree. The sentence as to Count III shall be consecutive to those received in Counts I and II.

The court has used its own discretion as to the setting of consecutive sentences. Among the factors considered are the seriousness of the offenses and the factual circumstances surrounding the offenses.

The defendant is remanded to the custody of the Sheriff of Marion County, Missouri, who shall transport defendant to the State Department of Corrections. He shall be allowed an extra guard. Appeal bond set at $250,000.00. The defendant indicates that he does not have any funds in which to pay court costs. The court finds that the expenses submitted by the Sheriff were necessary and reasonable. Audrain County is ordered to reimburse Marion County for expenses of this case that Marion County has incurred and to pay those that are not paid.

* * *

NOTICE OF APPEAL TO MISSOURI COURT OF APPEALS, ST. LOUIS DISTRICT

Notice is given that Russell Lee Epperson, Defendant appeals from the sentence entered in this action on the 25th day of February, 1976.

Appellant was convicted of murder in three (3) counts of first degree, a felony, under Section 559.010, RSMo 1969, which offenses are punishable exclusively by life sentences. The Court impose the sentence to run consecutively. This appeal does involve a construction of the Constitution of the United States and the Constitution of the State of Missouri. The Missouri Court of Appeals has jurisdiction. Article V, Section 3, Constitution of Missouri, as amended 1970. The case number assigned to this case by the Court of Common Pleas at Hannibla, Missouri, is 5133. The name of the Judge who heard the case is the Honorable James R. Reinhard. The reporter's name is Bettye S. Calnan. The Hannibal Court of Common Pleas is in the 10th Judicial Circuit. Appellant's bond is set at $250,000.00 and the defendant has not posted that bond.

MEMORANDUM OF THE CLERK

I have this day mailed by registered mail a copy of the within notice of appeal to each of the following persons at the address stated:

Missouri Court of Appeals
St. Louis District
Civil Courts Building
St. Louis, Missouri

Mr. John C. Danforth,
Attorney General
State of Missouri
State Capitol
Jefferson City, Mo.

Mr. Thomas Osbourne (sic)
Prosecuting Attorney
Audrain County
Court House
Mexico, Mo.

I have also mailed a copy of the notice of appeal to the clerk of the Missouri Court of Appeals, St. Louis District, together with the docket fee deposited by appellant.

/s/ Robert J. Mulvihill
Clerk

Dated March 1, 1976
Also, furnished copy to Ronald R. McKenzie, Prosecuting Attorney of Marion County, Mo.

FILED: March 1, 1976.

APPENDIX B

STATE of Missouri, Respondent,

v.

Russell Lee EPPERSON, Appellant.

No. 60308.

Supreme Court of Missouri,
En Banc.

Sept. 12, 1978.
Rehearing Denied Oct. 10, 1978.

* * *

David Bear, Columbia, for appellant.

John D. Ashcroft, Atty. Gen., Paul R. Otto, Asst. Atty. Gen., Jefferson City, for respondent.

RENDLEN, Judge.

Defendant Russell Lee Epperson was convicted on three counts of murder in the first degree for killing his wife Fern and their two children, Richard and De Ann. The jury assessed punishment on each count at life imprisonment and the court ordered that the sentences run consecutively.

On appeal, defendant contends that evidence used against him in the prosecution of the case was obtained during a warrantless search of his home by members of the municipal police force of the City of Mexico, Missouri, in violation of his rights under the Fourth Amendment to the Constitution of the United States and Art. I, § 15 of the Constitution of the State of Missouri. This contention turns on the answers to the following questions: (1) Was there an emergency situation justifying the warrantless entrance of defendant's house by the police which led to the discovery

of the bodies? (2) Can the initial entry and discovery be justified only by the *subjective* rationale and beliefs of the searching police officers or may it be based upon the *objective* facts known to the police officers and the logical deductions based thereon? (3) Was the additioinal warrantless search of the defendant's home immediately after the police had found the bodies of the three missing persons and ascertained that the defendant probably was not present, justified by the exigencies of the situation?

Appeal was taken to the Court of Appeals, St. Louis District, which in an opinion suggesting affirmance, determined that resolution of the issues involved an original construction of the Fourth Amendment to the Constitution of the United States and Art. I, § 15 Mo.Const.1945, and thus fell within the exclusive jurisdiction of this Court under Art. V, § 3, Mo.Const., as amended 1970. See *City of St. Louis v. Tinker*, 542 S.W.2d 512, 513[1] (Mo.banc 1976). Accordingly the Court of Appeals, without rendering a final decision, ordered the case transferred here. Portions of the well reasoned Court of Appeals' opinion have been utilized without quotation marks.

Defendant Epperson and his wife, Fern, lived with their two small children at 608 West Pearson, Mexico, Missouri. On Monday, March 24, 1975, Fern's mother, Mrs. Mary Ann Smith, attempted unsuccessfully to telephone her daughter at the Epperson home. Mrs. Smith then called defendant at his place of employment and inquired concerning the whereabouts of her daughter. He told her that Fern and the children had gone to Columbia to do some shopping, which Mrs. Smith considered strange as Fern usually left the children with her when shopping.

The next day, March 25, Mrs. Smith again tried calling her daughter at home but received no answer. That eve-

ning she and her husband saw Epperson on the town square in Mexico and he told them Fern was with his mother. However, when Mrs. Smith informed him that she knew Fern and the children were not with his mother Epperson said that he did not know where they were. After Mrs. Smith returned home she received a call from Epperson who told her that Fern had telephoned and said she would be home in the morning with the children.

On March 26, at approximately 8:30 a.m., Epperson again called Mrs. Smith and asked her to come to his house. At first she refused but when he told her that Fern would be there about 9:00 a.m. she agreed to go. At 8:45 a.m. appellant picked up Mrs. Smith in his truck and took her to his home. As she and the defendant went into the house he removed something from a cabinet, keeping it behind him while he locked the outside kitchen door. He stood against the door facing Mrs. Smith, keeping his left hand behind him and told her she should go into the front room and sit down. He also told her several times that "I'll sure be glad to get this all over." Mrs. Smith saw her daughter's purse on the clothes dryer in the kitchen and knowing that whenever her daughter left the house she took her purse with her, she became quite suspicious. At that time she also detected an odor in the house which, from prior experience, she associated with death. After making the excuse that she had some food in the oven at her home Mrs. Smith left the Epperson residence and went to the home of a neighbor, Mrs. Mitchell, and placed a call to the Police Department of the City of Mexico. Officer Schindler, responding to that call, met Mrs. Smith at the Mitchell house where she related the matter that had occurred. Schindler promptly summoned Sergeant Duffner and relayed this information to him.

Both officers immediately went to the Epperson home and finding all of the windows were covered with drapes or blinds, knocked on the doors without response. Ordering Schindler to remain near the house to observe if anyone left or entered, Sergeant Duffner walked next door to the home of Epperson's neighbor and through a series of calls obtained information as to Epperson's place of employment and that of his wife, as well as the school in which Richard was enrolled. He learned that Fern Epperson had been on vcaction that week but had not kept her usual Tuesday evening bowling date. From defendant's employer he found that defendant had stated the day before that he had taken his wife to the hospital for x-rays but a call to the family doctor revealed that he had not seen Mrs. Epperson since December of 1974 and Mrs. Smith had informed him that the hospital had no record of Fern reporting for x-rays. School personnel where Richard was enrolled told Sergeant Dufner that Epperson had called the school the day before and told them that his son Richard would be absent because of illness. Follow- a conference with the Chief of Police, Duffner was ordered to determine from Epperson's parents whether they had seen him and request that the parents come to the house.

The parents agreed to this suggestion and met the officers at the Epperson home where, again, knocking on the doors produced no response. Epperson's father pointed out that his son's motorcycle was not there and surmised he might be elsewhere riding it. However, the motorcycle was located at Epperson's place of employment but he could not be found. The parents then told the officers they would not break into their son's house and they then went to the home of the neighbor where Mrs. Smith was waiting. Nevertheless the father, accompanied by the two officers, again went to the home and the officers told the father

that he should be the one to enter the house. He eventually agreed to assist and after unsuccessfully trying to open the doors, a storm window was removed and an unlocked bedroom window opened. Duffner assisted the father in raising the window and a ladder was placed against the side of the building, the blinds were pulled back and the father and two police officers entered a bedroom of the house.

When they pulled back the blinds they saw what was apparently a human form lying under a sheet on the bed. While Schindler and Epperson's father went to the other parts of the house to see if anyone else was there Sergeant Duffner removed the sheet and discovered the bodies of Mrs. Epperson and the two children. The children had plastic bags over their heads and the son had a cord around his neck. Each showed signs of violent mistreatment. There was a sock in the bag over the daughter's head and another sock was near the wife's face. When the others returned to the room where the bodies were found, Duffner called his superior officers and then made an investigation of the house. As he walked through the house he saw a five gallon can of gasoline in the hallway near the bedroom, a chisel for an air hammer partially wrapped in towels in a chair in the living room and a bottle of chloroform on the top of the sewing cabinet in the kitchen. Later during an autopsy it was determined that blows by a blunt instrument had been inflicted on the victims and chloroform was found in their vital organs. Epperson, who could not be found, became the subject of an intensive manhunt and was apprehended ten days later.

I.

Defendant contends that facts known to the police when they broke into the defendant's house were not sufficient to justify the warrantless entry and original search. It first should be noted that by objective standards sufficient facts had been made known to the police to establish probable cause that a crime had been committed. These facts include (1) the defendant's wife and children had been missing several days; (2) defendant had given false and inconsistent explanations for their absence; (3) defendant's unusual, suspicious and nervous manner in the days following the disappearance of his family; (4) an odor of decomposing flesh had been detected in the house, and (5) defendant's unexplained disappearance, though he had been in the house with Mrs. Smith shortly before the police arrived.

[1-3] The question we first must decide is whether the facts were sufficient to establish exigent circumstances justifying a warrantless entry of the house. In general, an entry and search without a warrant are deemed unreasonable under the Fourth Amendment to the Constitution of the United States unless the action falls within certain carefully delineated exceptions. *United States v. U.S. District Court*, 407 U.S. 297, 318, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972); *Coolidge v. New Hampshire*, 403 U.S. 443, 455, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *Vale v. Louisiana*, 399 U.S. 30, 34, 90 S.Ct. 1969, 26 L.Ed.2d 409 (1970). The burden is on the State to show an exception exists. *Coolidge v. New Hampshire, supra*, 403 U.S. at 455, 91 S.Ct. 2022; *Vale v. Louisiana, supra*, 399 U.S. at 34, 90 S.Ct. 1969. Among the exceptions are searches incident to a valid arrest, searches of cars stopped on a road, seizures of evidence in plain view, stop and frisk searches, searches with consent, searches to prevent destruction of evidence, searches to prevent the flight of a criminal, and searches in response to a need for help. See *Coolidge v.*

New Hampshire, supra, 403 U.S. at 455-473, 91 S.Ct. 2022; *Vale v. Louisiana, supra,* 399 U.S. at 34-35, 90 S.Ct. 1969; *Terry v. Ohio,* 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *Warden v. Hayden,* 387 U.S. 294, 299, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967); *Chapman v. United States,* 365 U.S. 610, 615, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961).

The State contends that the entry and search fall within the "need for help" or the "emergency" exception, claiming that the odor of death combined with the long, unexplained absence of defendant's wife and children, defendant's suspicious behavior and his disappearance at the time of the search, gave probable cause to believe there was a medical emergency in which someone might be ill or injured and in need of immediate help. The State also urges these facts constituted probable cause to believe a crime has been committed *and* raised the possibility that a victim might be in need of assistance or medical aid which also justified the warrantless search.

The Supreme Court of the United States has held a warrantless search was reasonable in an emergency situation when a police officer heard a shot and a cry for help, *McDonald v. United States,* 335 U.S. 451, 454, 69 S.Ct. 191, 93 L.Ed. 153 (1948). For a discussion of the emergency doctrine and its history see *State v. Sutton,* 454 S.W.2d 481 (Mo.banc 1970). Because of the circumstances of the case, the search in *Sutton* was subsequently ruled unconstitutional in *Root v. Gauper,* 438 F.2d 361, 365 (8th Cir. 1971), but in *Root* it was recognized that Missouri had "the prerogative" to accept that doctrine, and we reaffirmed our adoption of the emergency exception in *State v. Miller,* 486 S.W.2d 435 (Mo.1972). See also *Wayne v. United States,* 115 U.S. App.D.C. 234, 240-243, 318 F.2d 205, 211-214 (1963).

It has been persuasively stated that whenever the police have reliable information of a death, an emergency exists sufficient to justify an immediate search because apparent death may turn out to be a barely surviving life, still to be saved. *Patrick v. State,* 227 A.2d 486, 489[3-9] (Del.Supr. 1967). Here, although the odor of decomposing flesh would indicate death of one of the persons involved, at least three persons were missing under very unusual circumstances and Epperson could not be found. One or more could have been in immediate need of help to prevent death. Many courts have approved searches upon the emergency exception rationale in situations similar to the case before us. See *People v. Brooks,* 7 Ill.App.3d 767, 289 N.E.2d 207 (1972); *People v. Hill,* 12 Cal.3d 731, 117 Cal.Rptr. 393, 528 P.2d 1 (banc 1974); *People v. Clayton,* 34 Ill.App.3d 376, 339 N.E.2d 783 (1975); *People v. Lovitz,* 39 Ill.App.3d 624, 350 N.E.2d 276 (1976); *State v. Pires,* 55 Wis.2d 597, 201 N.W.2d 153 (1972); *Geary v. State,* 91 Nev. 784, 544 P.2d 417 (1975); *People v. Mitchell,* 39 N.Y.2d 173, 383 N.Y.S.2d 246, 347 N.E.2d 607 (1976), cert. denied, 426 U.S. 953, 96 S.Ct. 3178, 49 L.Ed.2d 1191.

[4] *People v. Brooks, supra,* concerned facts remarkably similar to those at bar. There the victim and defendant, who were mother and son, lived together in the mother's apartment. Friends of the victim were unable to contact her for several days and when they questioned defendant concerning her whereabouts they received incredulous answers. After the janitor of the victim's apartment building noticed an odor of death in the place, he contacted the police. Upon arrival, the police detected a strong "odor of death," entered the victim's apartment and discovered her body in the living room. The Illinois Court upheld the *entry and subsequent search* of the apartment as a reason-

able response to an emergency situation. We hold that the exigent circumstances presented by this record justified the entry and original search of the house as "reasonable" under the Fourth Amendment to the United States Constitution and Art. I, § 15, Mo.Const., 1945.

II.

The defendant, as further challenge to the entry and search, places great emphasis on the police officers' statement of their subjective belief that no crime had been committed and their somewhat ambiguous statements as to a possible emergency. The State counters with the contention that when the legality of a search is in question the subjective thoughts of the police are not controlling but instead the objective facts within their knowledge and the reasonable conclusions objectively drawn therefrom are determinative.

The Supreme Court of the United States has measured both probable cause and the warrant requirements for searches against objective standards. It has stated that in determining the reasonableness of a particular search, "it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search '*warrant a man of reasonable caution in the belief*' that the action taken was appropriate?" (Emphasis added.) *Terry v. Ohio, supra,* 392 U.S. 1, 21-22, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889. The Court in *Terry* emphasized that subjective good faith alone is not enough; that there must also be objective reasonableness to enable meaningful review by the court.

Many lower federal courts and some state courts have said, sometimes in dicta, that objective reasonableness alone

suffices to uphold either an arrest or a search. See *United States ex rel. LaBelle v. La Vallee,* 517 F.2d 750, 754[7-8] (2d Cir. 1975), cert. denied, 423 U.S. 1062, 96 S.Ct. 803, 46 L.Ed.2d 655 (1976); *United States v. McCoy,* 517 F.2d 41, 43 n. 1[1] (7th Cir. 1975), cert. denied, 423 U.S. 895, 96 S.Ct. 195, 46 L.Ed.2d 127 (1975); *United States v. Vital-Padilla,* 500 F.2d 641, 644[2] (9th Cir. 1974); *White v. United States,* 448 F.2d 250, 254[5] (8th Cir. 1971), cert. denied, 405 U.S. 926, 92 S.Ct. 974, 30 L.Ed.2d 798 (1972); *Sirimarco v. United States,* 315 F.2d 699, 702[7] (10th Cir. 1963), cert. denied, 374 U.S. 807, 83 S.Ct. 1696, 10 L.Ed.2d 1032 (1963); *State v. Donnell,* 239 N.W.2d 575, 578[6] (Iowa 1976); *Commonwealth v. Miller,* 366 Mass. 387, 318 N.E.2d 909, 911[4] (1974); *Commonwealth v. Donnelly,* 233 Pa.Super. 396, 336 A.2d 632, 637[5-6] (1975), cert. denied, 424 U.S. 974, 96 S.Ct. 1477, 47 L.Ed.2d 744 (1976). Cases holding that the objective facts were not enough have done so on the basis that the police officers' subjective motives were demonstrably in bad faith. See *Mills v. Wainwright,* 415 F.2d 787, 790[1] (5th Cir. 1969); *Moss v. Cox,* 311 F. Supp. 1245, 1251-52[13-15] (E.D.Va.1970). Contra *United States v. Dunavan,* 485 F.2d 201, 205[4-6] (6th Cir. 1973). This is not a problem here as the officers in good faith were searching for persons missing under unusual circumstances rather than to harass the defendant or entering to search for evidence linking him with a crime.

[5] Furthermore, the officers' testimony reveals that though they may have considered this a "missing persons" investigation they also considered the medical emergency factors involved. In response to the question why he did not get a search warrant Sergeant Duffner testified:

> Well, I really didn't know what I had. I didn't know – I knew the circumstances, that Russell Epperson and

his wife were gone; and as far as I was concerned, I was just looking to try to find them to see if they had skipped the country or *they were injured* or what. I didn't really know what I had. I mean there was no indication further to my prior investigation of any foul play involved of [sic] anything. As far as I knew they were just gone wherever they went; I couldn't tell. (Emphasis ours.)

From this response it appears the officer in charge of the search considered the probability that someone in the house might be injured and need medical aid. By an objective standard there are sufficient facts to justify the officers' initial entry into defendant's home, despite the ambiguous testimony as to their subjective belief.

[6, 7] Following the entry under the emergency doctrine, the officers could seize evidence of the crime in the bedroom under the theory of "plain view,"[1] if such evidence was readily observable and was discovered inadvertently rather than by anticipation or by a concerted search, and was immediately recognized as evidence of a crime. *Coolidge v. New Hampshire, supra,* 403 U.S. at 465, 91 S.Ct. 2022; *State v. Dayton,* 535 S.W.2d 479, 486[6-8] (Mo.App. 1976). Here, following the officers' permissible warrantless entry through the window of the bedroom, they could properly pull back the sheet to see if the form observed on the bed was that of a living person. It is then that evidence, such as the bodies, cord, socks and plastic

[1] The Supreme Court of the United States has stated, "Where the initial intrusion that brings the police within plain view of such an article is supported, not by a warrant, but by one of the recognized exceptions to the warrant requirement, the seizure is also legitimate." *Coolidge v. New Hampshire,* 403 U.S. 443, 465, 91 S.Ct. 2022, 2037, 29 L.Ed.2d 564 (1971).

bags came into "plain view," which the police immediately recognized as evidence of a crime. All such items found in the bedroom, as well as the photographs taken there, were properly admitted in evidence. For similar decisions in other states see *Patrick v. State, supra,* 227 A.2d at 489-90[9-11]. *People v. Brooks, supra,* 289 N.E.2d at 214; *People v. Hill, supra,* 117 Cal.Rptr. at 412, 528 P.2d at 20.

III.

The admission of evidence from rooms of the house other than the bedroom presents a somewhat different problem and cannot be justified under the plain view doctrine except as they might be said to have been inadvertently discovered during a continuation of the emergency search for injured or missing persons. This evidence was discovered as a result of Sergeant Duffner's search of the rest of the house immediately following the initial search for defendant (a source of potential danger) or other victims by Officer Schindler and Epperson's father. If the evidence had been found moments earlier during Schindler's cursory search, it would clearly have been admissible under the plain view theory. *United States v. Blake,* 484 F.2d 50, 57[7-8] (8th Cir. 1973), cert. denied, 417 U.S. 949, 94 S.Ct. 3076, 41 L.Ed.2d 669 (1974); *State v. Dayton, supra,* 535 S.W.2d at 484-86[1-4].

However, the evidence adduced at the hearing for the motion to suppress and at trial revealed that the bottle of chloroform, the gasoline can and the chisel were found and the photographs and diagram of the other rooms were made by Sergeant Duffner after he had discovered the bodies of the three missing persons and Officer Schindler had ascertained that neither defendant nor any other victim were in the house.

In *People v. Brooks, supra,* after the police discovered the body of defendant's mother in his apartment following the warrantless entry justified by the emergency exception, they searched the apartment and discovered a bloody rug in the bathroom and a blood splattered shirt in one of the bedrooms. Shortly thereafter other police personnel arrived and photographed the apartment's interior. All of this activity occurred without a search warrant, though upon the discovery of the body defendant became the only suspect. In that case the defendant claimed the search and seizure of physical evidence violated his rights under the Fourth Amendment. However, the Illinois Court justified the initial entry, the immediate discovery of the body, as well as the subsequent search which yielded the rug and shirt by the emergency exception. See also *People v. Clayton,* 34 Ill.App.3d 376, 339 N.E.2d 783 (1975) and *People v. Lovitz,* 39 Ill.App.3d 624, 350 N.E.2d 276 (1976) for remarkably similar fact situations with the same result.

The case of *Michigan v. Tyler,* No. 76-1608, ___ U.S. ___, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978), is clear authority to render the warrantless entry in the case at bar "reasonable," under the Fourth Amendment to the Constitution of the United States, and having discovered the victims of the crime, to authorize the police to investigate for and seize readily accessible evidence of the crime. In that case defendants were convicted of conspiracy to burn real property in violation of the applicable Michigan statute. Shortly before midnight on January 21, 1970, a fire broke out in the building leased to the defendant, Tyler. The fire department responded, quenched the fire and "was 'just watering down smoldering embers'" when Chief See arrived on the scene about 2:00 a.m. on the morning of January 22. A Lieutenant of the fire department informed the Chief that "two plastic containers of flammable liquid had

been found in the building." Using portable lights the Chief and the Lieutenant entered the gutted store which was filled with smoke and steam to examine the plastic containers. They concluded that the fire "'could possibly have been an arson,'" whereupon the Fire Chief called police Detective Webb who arrived at about 3:30 a.m. and took several pictures of the containers and the interior of the store. However, they abandoned their efforts to search after the Chief had "[l]ooked throughout the rest of the building to see if there was any further evidence, to determine what the cause of the fire was." By 4:00 a.m. the fire had been finally extinguished and the firemen departed. The Fire Chief and the Detective took the two containers to the fire station where they were turned over to the Detective for safekeeping. They had neither consent nor warrant for the entries of the building nor for the removal of the containers.

About four hours after leaving the premises, Chief See with his assitant returned to the empty building to determine the origin of the fire and examine for arson. After a cursory inspection they left but at about 9:00 a.m. that morning the Assistant Chief and Detective Webb returned to the building looking for evidence of arson and they discovered suspicious burn marks in the carpets which Webb could not see earlier that morning because of the heat, steam and darkness. They also found pieces of tape, with burn marks, on the stairway. After leaving the building to obtain tools they returned and removed pieces of the carpet and sections of the stairs to preserve these bits of evidence suggestive of a fuse trail. The Assistant Chief also searched through the rubble "looking for any other signs or evidence that showed how this fire was caused." l.c. ____, 98 S.Ct. l. c. 1946. Again, there was neither consent nor warrant for these entries and seizures. Both at trial and on appeal

the defendants objected to the introduction of evidence obtained during these searches. Thereafter other investigators entered the premises on January 26 and 29, and again on February 16 to gather evidence concerning the charge of arson and the cause of the fire.

The Court held that Fourth Amendment protection extends to entries by officials, whether they be building inspectors, police, representatives of the health department, firemen or others. That such entries are permissible only on proper warrants or with consent or if exigent circumstances occur of sufficient proportions to render a warrantless entry "reasonable." In that case the firemen were deemed to have made a reasonable entry when entering the burning structure to put out the blaze and were permitted to seize the readily observable evidence of arson. Thus the Fourth and Fourteenth Amendments were not violated by the entry of the firemen to extinguish the fire at Tyler's Auction, nor by Chief See's removal of the two plastic containers of flammable liquid found on the floor of one of the showrooms.

Prior to 4:00 a.m. on January 22, however, the firefighters suspected arson and summoned the police whose investigation was not only for the cause of the fire's origin but to determine whether a crime had been committed. Defendants objected to any of the evidence following the time the firefighters and the police detective left the premises about 4:00 a.m., including the entries at 8:00 a.m. and 9:00 a. m. when the Assistant Fire Chief and the Detective returned to the premises, made a detailed inspection but left the building again to obtain tools, then returned and removed parts of the carpet and stairs and continued to search through the rubble. The Court stated that the original exigent circumstance of the fire permitted

the entry, noting that the officials charged with extinguishing the fires are also charged with prompt determination of their origin. The Court added that "[i]mmediate investigation may also be necessary to preserve evidence from intentional or accidental destruction. And of course, the sooner the officials complete their duties, the less will be their subsequent interference with the privacy and recovery efforts of the victims." l. c. ——, 98 S.Ct. l. c. 1950. The Court then concluded "[o]n the facts of this case, we do not believe that a warrant was necessary for the early morning re-entries on January 22," nor the re-entries at about 8:00 a. m. and 9:00 a. m. for "[u]nder these circumstances, we find that the morning entries were no more than an actual continuation of the first, and the lack of a warrant thus did not invalidate the resulting seizure of evidence." l. c. ——, 98 S.Ct. l. c. 1951.

Thus the investigation of the building for arson and the taking of pieces of the stairs, carpet and the flammable liquid found in the plastic containers, as well as the search of the building for other evidence of arson, were a continuation of the exigent entry. The right of the officers to return after daylight and continue their investigation sprang from the fact that the exigent quality of the circumstances continued. The Court stated "[i]n determining what constitutes 'a reasonable time to investigate,' appropriate recognition must be given to the exigencies that confront officials serving under those conditions, as well as to individuals reasonable expectations of privacy." The emergency of the fire permitted the entry. The length of time and scope of the search for evidence of possible arson was extended by finding the plastic containers containing the flammable liquid. However, the Court held

that the entries occurring *after* January 22 "were clearly detached from the initial exigency and warrantless entry."[2]

In the case sub judice, the urgent circumstances permitting the warrantless entry included possibility of death, illness, or serious injury to persons in the house. After the entry, the exigent quality of the moment was heightened by discovery of the bodies, apparently brutally murdered. The limited superficial search that followed and the removal of the bodies, the taking of photographs of a few scenes in the house and the removal of the few items of personal property not located in the bedroom were within the reasonable time, spatial scope and limited intensity

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[2] The United States Supreme Court has recently disapproved Arizona's "murder scene exception" to the reasonable search requirement of the Fourth Amendment in *Mincey v. Arizona*, —— U.S. ——, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978), and condemned the admission of evidence taken in an extended four day warrantless search during which a number of police officers proceeded to gather evidence from defendant's apartment. This search followed the warrantless entry and fatal wounding of a narcotics agent and the arrest of defendant in his apartment who was also wounded in the shootout. The officers, after the removal of defendant, the wounded officer and other suspects, proceeded in the four day search. During that period "the entire apartment was searched, photographed and diagramed. The officers opened drawers, closets and cupboards, and inspected their contents; they emptied clothing pockets; they dug bullet fragments out of the walls and floors; they pulled up sections of the carpet and removed them for examination. Every item in the apartment was closely examined and inventoried and two or three hundred objects were seized. In short, Mincey's apartment was subjected to an exhaustive and intrusive search." l. c. ——, 98 S.Ct. l. c. 2412. The exigency of the situation could not extend to nor render reasonable such an intensive, long term search. The facts in *Mincey* were clearly distinguishable from those in *Tyler*, or those in the case at bar.

approved by *Tyler*. Thus the absence of a warrant or of consent, as in *Tyler*, did not render the challenged evidence inadmissible and for these reasons defendant's contention is denied.

[8] As previously discussed, the bodies, plastic bags and chloroformed socks and venetian blind cord were discovered in the bedroom and admissible under the plain view doctrine and the evidence from the other part of the house (i. e., the gasoline can, chisel, bottle of chloroform and certain of the photographs) were within the scope of the emergency exception to the Fourth Amendment as delineated in *Michigan v. Tyler*, No. 76-1608, —— U.S. ——, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978). We are also convinced that had admission of this latter evidence been deemed improper, such admission would have been non-prejudicial. The evidence of defendant's guilt was strong and certain. Defendant fled the area and despite an intensive search covering several counties, was not apprehended until ten days after the discovery of the crime. We are aware, as stated in *State v. DeGraffenreid*, 477 S.W.2d 57, 65 (Mo.banc 1972) "that error which in a close case might call for a reversal may be disregarded as harmless when the evidence of guilt is strong." See *State v. Davis*, 556 S.W.2d 45 (Mo.banc 1977) and *Thomas v. United States*, 281 F.2d 132 (8th Cir. 1960).

The body of testimony from thirteen State's witnesses occupying almost two hundred transcript pages and some twenty-six exhibits, not including those discovered in Duffner's search, were unrebutted. Defendant offered no evidence. We believe beyond a reasonable doubt the overwhelming weight of the evidence was such that the claimed error, and we find none, could only have been non-prejudicial. The judgment of the trial court is affirmed.

MORGAN, C. J., and BARDGETT, FINCH and DONNELLY, JJ., concur.

SEILER, J., dissents in separate dissenting opinion filed.

SIMEONE, J., not participating because not a member of the Court when cause was submitted.

SEILER, Judge, dissenting.

I respectfully dissent. What the police did here was to break into a man's home. It is true that they did so rather politely, using defendant's father as their arm, and not resorting to a sledge hammer, but the fact remains that they entered a man's home, a cherished and well nigh sacred place to most of us, by force, without first obtaining a search warrant to do so.

This is being justified on the ground it was warranted by an emergency. In my opinion, we are providing a dangerous and alarming precedent here, one which will give the police extremely broad powers and which seriously reduces the protection of the Fourth Amendment against unreasonable seraches and seizures. We are developing a new doctrine for the police—the delayed response doctrine or once an emergency, always an emergency, with no need for a search warrant thereafter.

Wiser men than I have pointed out the dangers of relaxing Fourth Amendment standards.

As said in *McDonald v. United States*, 335 U.S. 451, 455-56, 69 S.Ct. 191, 193, 93 L.Ed. 153 (1948):

> "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the

> citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constituional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative."

See also, Brinegar v. United States, 338 U.S. 160, 182, 69 S.Ct. 1302, 93 L.Ed. 1879 (1948) (per Jackson, J., dissenting):

> "We must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit.
>
> ". . .
>
> "And we must remember that the authority which we concede to conduct searches and seizures without warrant may be exercised by the most unfit and ruthless officers as well as by the fit and responsible, and resorted to in case of petty misdemeanors as well as in the case of the gravest felonies."

The question before us is not simply whether there was an emergency making reasonable a warrantless entry and search of defendant's home. The question is whether *this particular* warrantless entry, search and seizure can be upheld under the emergency doctrine in light of the almost two and a half hour delay by the officers. The proposed opinion does not address this critical difference between this case and those on which it relies. The latest United States Supreme Court case on the subject states: "[A] warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation.'" *Mincey v. Arizona,* —— U.S. ——, ——, 98 S.Ct. 2048, 2414, 57 L.Ed.2d Ed.2d 290 (June 21, 1978).

Under part I, the opinion discusses the state's contention that the entry was justified under the "need for help" or "emergency" exception, saying the circumstances gave probable cause to believe there was a medical emergency "in which someone might be ill or injured and in need of *immediate help*" (emphasis supplied). Then the opinion refers to the rule of certain cases that whenever the police had reliable information of a death, an emergency exists sufficient to justify an *immediate* search, because apparent death may turn out to be barely surviving life, still to be saved. The opinion points out the odor of decomposing flesh indicated death of at least one person, but there were three persons missing and "one or more could have been in immediate need of help to prevent death." But this justification was not acted on by the police for over two and a half hours. I fail to see how the belated warrantless entry made by the police can be justified as being appropriate under an emergency calling for immediate entry to help someone inside the house in need of immediate assistance.

The exigency of the situation when it first became apparent objectively, whether the police appreciated it or not, that something was seriously wrong inside the Epperson house cannot be extended to, nor render reasonable, in my opinion, a forcible entry made several hours later, during which interval the police could have obtained a search warrant. What we are developing here is a new weapon for the police—the continuing exigency justification, where a delayed entry will be held to relate back to the original emergency, thus obviating the need for a search warrant even though there was ample time in which to obtain one.

Not only does such a doctrine fail to comport with the way reasonable people, including policemen, ordinarily react to emergency "need of help" situations, it means the police can safely delay entry, so far as entering legally is concerned. This is not calculated, in my opinion, to produce prompt action by the police in an emergency and this may delay legitimate investigation.[1]

In *Michigan v. Tyler,* —— U.S. ——, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978) there was a lapse of one and a half to two hours between the initial appearance of the police investigator on the scene and the second appearance around 4:00 a. m. Then there was a third entry around 9:00 a. m. All three entries were held valid and a search warrant was not required. But the difference in the cases is that in *Michigan v. Tyler* the first entry was

[1] To illustrate, the search for Epperson did not get under way until in the afternoon, hours after the emergency first came to the attention of the officers. The delay on the part of the police apparently enabled him to get a good head start, because, despite an extensive search, he was not arrested until ten days later, when he voluntarily surrendered.

made at the time the emergency arose, while the smoldering embers of the arson were still being extinguished, and the court found that the subsequent warrantless entries mentioned above "were no more than an actual continuation of the first", *Id.* at ——, 98 S.Ct. at 1951, not detached from the initial exigency. In the case at bar there was no entry at the initial exigency. The entry came several hours later, long after the objective indicia first suggested the possibility of death or need for help within the Epperson house.

In *Patrick v. State*, 227 A.2d 486, 489 (Del.Supr.1967), cited as supporting the action of the police, the court speaks in terms of the police duty "to act forthwith upon the report of the emergency", not to miss the chance that "a spark of life remains", as the basis for the emergency situation exception. In the *Patrick* case, the police "immediately entered the premises", *id.* at 488, upon their arrival at the scene. In the present case, if there had been a spark of life existing at 9:15 a.m. (which is when the police first learned of the situation) in someone needing immediate aid, it would have died out long before the police finally entered at approximately 11:50 a. m.

People v. Brooks, 7 Ill.App.3d 767, 289 N.E.2d 207 (1972), also relied upon and discussed in the proposed opinion, likewise speaks in terms of an emergency which required "immediate action." In the *Brooks* case, the janitor in the apartment building caused the police to be called. When they were going up the stairs to the deceased's apartment they notice the odor of decomposing flesh. When they got to the front door of the apartment the police opened the door and promptly went in and found the deceased (who had been dead for several days) on the couch in the living room. *Id.* at 210. There was

no delay on the part of the police in acting. The *Brooks* case, *id.* at 213, quotes with approval the language of Mr. Justice Burger in *Wayne v. United States*, 115 U.S.App.D.C. 234, 318 F.2d 205, 212 (1963), *cert. denied* 375 U.S. 860, 84 S.Ct. 125, 11 L.Ed.2d 86 (1963), in which he stresses the duty of the police, when confronted by an emergency, *to act* and the need for swift police response in order to support what would otherwise be an illegal entry.

The facts in *Brooks* are significantly different from the facts in the present case, in which we have no such swift response. The police knew as early as 9:15 to 9:20 a. m. that Mrs. Smith noticed the oder of decomposing flesh in the Epperson house and that her son-in-law was acting suspiciously and that she had reason not to believe his explanations of the whereabouts of her daughter and two grandchildren.[2]

The state in its brief states that "speed was of the essence to bring aid to anyone who needed it . . ." But the police took no action then. Instead, as the facts related in the proposed opinion show, the police tried to figure figure out some way by which they could induce someone else to break in the house so that the entry would not be charged to them. It was almost noon, two and a half hours later, when the police finally entered the bedroom. If entry to the premises could be delayed this long, obviously there was no immediate need emergency. A true emergency does not invite delayed action. The two are mutually inconsistent.

[2] One analyzing the facts of this case finds himself returning again and again to the fact that Mrs. Smith noticed the odor of death—decomposing human flesh—in the Epperson house. It was this fact that made it apparent that something was very, very wrong in the Epperson house, as she made clear to the police in her initial report.

Someone may say, however, that despite the delay by the police, the need for help and in that sense the emergency, continued throughout the period of delay. But the point is that if so, the justification for dispensing with a search warrant did not, because one could easily have been obtained during that time, as discussed later herein. If the police are confronted with an emergency they should act. If they choose to delay, then they should obtain a search warrant. They should not be permitted both to delay and to dispense with a search warrant. That is not what is called for by the Fourth Amendment.

Under part II, the opinion takes up the matter of objective standards, quoting from *Terry v. Ohio,* 392 U.S. 1, 21-22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) about whether the facts available at the moment of the search would warrant a man of reasonable caution in believing what was done was appropriate. The moment of search here was shortly before noon, over two and a half hours after the officer had reason to believe there was a dead body in the house and that three people were missing. I do not believe a reasonable man would consider it was appropriate to wait two and a half hours and then enter the premises to see if there might be someone inside alive and in need of help.

The opinion then, still under part II, says that what the officers were doing was in good faith searching for persons missing under unusual circumstances. I agree. But a search for missing persons, while a serious matter,[3] is not

[3] In *Mincey v. Arizona, supra,* —— U.S. at ——, 98 S.Ct. at 2410, the court declined "to hold that the seriousness of the offense under investigation [there murder, assault and narcotics] itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search."

per se an emergency of the kind under discussion, nor did the police consider it such, as shown by the unhurried way in which they went about it.

The opinion states that the validity of the search must be judged on objective reasonableness, but then quotes Sgt. Duffner's subjective thoughts "as far as [he] was concerned" that he really didn't know what he had, that he was just looking to see "if they had skipped the country or they were injured or what." There is no testimony in the record that Sgt. Duffner ever expressed these thoughts to anyone. In fact, he testified he did not think anyone was in the house, that he was not alarmed, but was extremely curious. The record shows that Duffner consulted several times during the morning with the chief of police, Chief Bolli, as well as with Officer Schindler. Chief Bolli told them the police were not to break in the house. Much of the police discussion related to the possibility of getting defendant's father to do the breaking in. There is no mention (except for Duffner's thought to himself) of there being any need to break in because someone inside needed help and quickly.

As the proposed opinion states, the general rule is that an entry and search without a warrant is unreasonable and the burden is on the state to show an exception exists. The state has failed to do so. The "need for help" or "emergency" justification comes from the state as an afterthought to justify a belated entry. The officers were curious about what had happened to Epperson, his wife, and children. They wanted to enter the house to investigate, not to try to give first aid to someone who might be in dire circumstances.

Defendant's motion to suppress the evidence discovered and seized after the unlawful entry should have been sus-

tained. It is true this would result in a reversal and a new trial for a defendant who no doubt is guilty as charged. But we cannot disregard the Fourth Amendment in cases where to do so will benefit the defendant. Having seen fit not to act promptly upon the information furnished by Mrs. Smith, the police should have obtained a search warrant and entered the house legally. They could easily have done so. It was a weekday, Wednesday. The court house is located in Mexico. The magistrate, the circuit judge, and the prosecutor were close at hand. The police had control of the situation at the house because they were watching and standing guard over it. There was no need for them to break into defendant's home two and one half hours later. They were in possession of facts which they should have presented to a neutral magistrate for his determination as to whether there was probable cause that a crime had been committed and that a search of the house was warranted. It is noteworthy that no suggestion is made by the state that a search warrant could not easily and conveniently have been obtained.

The recent *Mincey* decision, mentioned earlier, states: "There was no indication that evidence would be lost, destroyed or removed during the time required to obtain a search warrant. Indeed, the police guard at the apartment minimized that probability. And there is no suggestion that a search warrant could not easily and conveniently have been obtained." *Id.* at ——, 98 S.Ct. at 2415. *See, also United States v. Donovan,* 429 U.S. 413, 436 n. 24, 97 S.Ct. 658, 50 L.Ed.2d 652 (1977), as follows: "Although law enforcement officials can often take action without a warrant when they have been unable to foresee the circumstances that eventually confronted them, they still must obtain a search warrant when their prior knowledge is sufficient to establish probable cause . . ."

Here there can be no doubt that for a considerable period of time prior to their breaking into the house, the police officers had sufficient knowledge to establish probable cause. *See also Vale v. Louisiana,* 399 U.S. 30, 34-35, 90 S.Ct. 1969, 26 L.Ed.2d 409 (1970).

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States,* 333 U.S. 10, 13-14, 68 S.Ct. 367, 92 L.Ed. 436 (1948), as quoted with approval in *Mincey v. Arizona, supra.*

It is our duty to uphold defendant's constitutional rights under the Fourth Amendment, whether or not he is guilty. If we do not enforce the Fourth Amendment, no one will. Here defendant's counsel carefully and properly raised the constitutional question and has preserved it throughout. The motion to suppress should have been sustained. I therefore respectfully dissent.

APPENDIX C

CLERK OF THE SUPREME COURT
State of Missouri
Jefferson City, Missouri
65101

THOMAS F. SIMON
Clerk

TELEPHONE
(314) 751-4144

October 10, 1978

Mr. David V. Bear, III
609 East Broadway
Columbia, MO 65201

In re: State of Missouri vs. Russell Lee Epperson - No. 60308

Dear Mr. Bear:

This is to advise that the Court this day has made the following order in the above-entitled cause:

"Appellant's motion for rehearing overruled."

Yours very truly,

/s/ Thomas F. Simon
Thomas F. Simon

cc: Attorney General
Thomas Osborne

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI:

I, THOMAS F. SIMON, Clerk of the Supreme Court of Missouri, do hereby certify that the attached letter is a true copy of the letter sent to the attorneys of record transmitting this court's order of October 10, 1978 denying appellant's motion for rehearing in cause No. 60308 entitled State of Missouri vs. Russell Lee Epperson.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the Seal of the Supreme Court of the State of Missouri, at my office in the City of Jefferson, State aforesaid this 22nd day of December, 1978.

/s/ Thomas F. Simon
Clerk, Supreme Court of Missouri

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60308 State of Missouri, resp., vs. Russell Lee Epperson, app. Appellant's motion for rehearing overruled.

60515 State of Missouri, resp., vs. Johnny Lee Mason, app. Respondent's motion for rehearing overruled.

60106 Vic Koepke Excavating and Grading Company, a corp., resp. Respondent's motion for rehearing overruled.

60991 State of Missouri, resp., vs. Omer Ray Burns, app. Appellant's motion for leave to file an untimely notice of appeal overruled.

60999 Willis L. Rodgers, pet., vs. State of Missouri, resp. Petitioner's motion for leave to file application to transfer out of time from the Missouri Court of Appeals, St. Louis District No. 39319, sustained; application is denied.

61012 State of Missouri, resp., vs. Lee A. Hoy, app. Appellant's motion for leave to file application to transfer out of time from the Missouri Court of Appeals, Kansas City District No. 28480 sustained; application is denied.

60939 LeRoy Reynolds, pet., vs. Missouri Department of Corrections, resp.
Petitioner's petition for writ of habeas corpus denied.

Day - to - Day,

J. P. Morgan, Chief Justice

STATE OF MISSOURI–SCT.:

I, THOMAS F. SIMON, Clerk of the Supreme Court of Missouri, do hereby certify that the foregoing is a true copy of the orders of said court on p. 6 of the Banc Minutes entered on the 10th day of October 1978, as fully as the same appears of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court. Done at office in the City of Jefferson, State aforesaid, this 22nd day of December, 1978.

/s/ Thomas F. Simon, Clerk.

By Mary Elizabeth McHaney, D.C.

APPENDIX D

IN THE MISSOURI COURT OF APPEALS
ST. LOUIS DISTRICT
DIVISION THREE

STATE OF MISSOURI,	)	No. 37927
	)	
Plaintiff-Respondent,	)	Appeal from the Hannibal
	)	Court of Common Pleas,
	)	Hannibal, Mo.
vs.	)	
	)	Hon. James R. Reinhard,
RUSSELL LEE EPPERSON,	)	Judge
	)	
Defendant-Appellant.	)	OPINION FILED
	)	July 26, 1977

Defendant Russell Lee Epperson was convicted on three counts of first degree murder for the killing of his wife Fern and his two children Richard and DeAnn. The jury assessed punishment on each count at life imprisonment and the court ordered the sentences to run consecutively. On appeal the defendant contends that the evidence used against him in the prosecution of the case came from a warrantless search of his home by members of the municipal police force of the City of Mexico, Missouri, in violation of his rights under the Fourth Amendment of the Constituion of the United States and Article I, Section 15 of the Constitution of the State of Missouri. We consider the facts presented by the evidence in the hearing on defendant's motion to suppress and the evidence in the trial of the case as they concern the defendant's contention.

Defendant Epperson lived with his wife Fern and their two small children at 608 West Pearson, Mexico, Missouri. On March 24, 1975, Fern's mother, Mrs. Mary Ann Smith, unsuccessfully attempted to telephone her daughter at her home. Mrs. Smith then called Epperson at his place of employment inquiring about the whereabouts of her daughter. He told Mrs. Smith that Fern and the children had gone to Columbia to do some shopping. Mrs. Smith considered that this was unusual because Fern usually left the children with her when Fern went shopping. The next day Mrs. Smith again tried calling her daughter at home but received no answer. That evening she and her husband saw Epperson on the town square in Mexico. He told them at that time that Fern was with his mother. However when Mrs. Smith informed him that Fern and the children were not with his mother, Epperson then said that he did not know where they were. After Mrs. Smith returned home she received a call from Epperson who told her that Fern had telephoned him and had informed him she would be home in the morning with the children. On March 26, 1975, at approximately 8:30 a.m., appellant called Mrs. Smith and asked her to come over to his house. She refused at first but then agreed to come. At 8:45 a.m. appellant stopped for Mrs. Smith in his pickup truck and took her to his home. He informed her that Fern would be there about 9 o'clock. As she and the defendant went into the home, he removed something from a cabinet and kept it behind him while he locked the kitchen door. He then stood against the door facing Mrs. Smith. He asked Mrs. Smith to go into the living room and told her several times that he would be glad when this was all over. Mrs. Smith saw her daughter's purse on the dryer and remembered her daughter never left the house without taking it with her. She also smelled an odor which, from prior experience, she associated with death. After making up an excuse that she had some food in the oven at her home, she left the Epperson residence and went to the home of the neighbor. A call was then placed to the Department of Public Safety of the City of Mexico and Office Schindler responded. He met Mrs. Smith at the neighbor's house where she related to him the facts and events described above. Officer Schindler then summoned Sergeant Duffner and imparted to him the information Mrs. Smith had given.

Both officers then went to the Epperson home, knocked on the doors without getting a response and found that all of the windows were covered with drapes or blinds. After ordering Officer Schindler to remain near the house in order to observe if anyone left or entered it, Sergeant Duffner returned to the police station. He thereupon called Epperson's next door neighbor and obtained information as to the places of employment of the defendant and his wife and the school in which Richard was enrolled. He determined that Fern Epperson had been on vacation that week but had not attended her usual Tuesday evening bowling. From defendant's employer he found that the defendant had stated the day before that he had taken his wife to the hospital for x-rays but a call to the family doctor revealed that he had not seen Mrs. Epperson since December of 1974. Mrs. Smith had informed him that the hospital had no record of Fern reporting for x-rays. School personnel where Richard was enrolled told Sergeant Duffner that Epperson had called the school Monday and told them that his son Richard would be absent because of illness. Following a conference with the Chief of Police, the chief ordered Duffner to find out from Epperson's parents whether Epperson had been seen

by them and to request them to come to the house. The sergeant then arranged to meet Epperson's parents at the defendant's home.

Duffner and Schindler met the parents at the Epperson home and again failed to get a response by knocking on the doors. Epperson's father told him that he did not see his son's motorcycle there and that he might be riding on it. The parents told the officers that they would not break into their son's house and the parents then went to the home of the neighbor where Mrs. Smith was still present. Epperson's motorcycle was found at his place of employment but he was not there. The father and the two police officers again went to the home and the officers told the father that he should be the one to enter the house. The father eventually agreed to assist and after unsuccessfully trying to open the doors, a storm window was taken off a window where the inner window was unlocked. Duffner assisted the father in raising the window and a ladder was placed against the side of the building, the blinds were pulled back and the father and two police officers entered a bedroom in the house. When they pulled the blinds back they saw a human form lying under a sheet on the bed. While Schindler and Epperson's father went to the other parts of the house to see if anyone else was there, Sergeant Duffner removed the sheet from the form and discovered the bodies of Mrs. Epperson and the two children. The children had plastic bags over their heads and the son had a cord around his neck. There was a sack in the bag over the daughter's head and another sack was near the wife's face. The other two returned where the bodies were located and Duffner called his superior officers and then made an investigation of the house. As he walked through the house he then found a five-gallon can of gasoline in the

hallway near the bedroom. He found a chisel for an air hammer partly wrapped in towels in a chair in the living room and a bottle of chloroform on top of the sewing cabinet in the kitchen. Chloroform was found in the vital organs of the victims and blows by a blunt instrument had been inflicted on some of the victims.

It is the defendant's contention that the facts known to the police when they broke into the defendant's house were not sufficient to justify a warrantless search. On the other hand the State contends that the known facts were sufficient to lead a police officer to believe both that a crime had been committed and that exigent circumstances required an immediate entry in that there was someone in the house who might need immediate medical aid.

Objectively speaking, there were sufficient facts known to the police to establish probable cause that a crime had been committed. The defendant's wife and children had been missing several days; defendant had given false and inconsistent explanations for their absence; defendant was acting in a strange and nervous manner; there was an odor of decomposing flesh in the house; and the defendant could not be located.

The question remains, however, as to whether there were sufficient facts to establish exigent circumstances justifying a warrantless search. In general a search without a warrant is unreasonable and there are few exceptions and these are carefully delineated. United States v. U.S. District Court, 407 U.S. 297, 318 (1972); Coolidge v. New Hampshire, 403 U.S. 443, 454, 455 (1971); Vale v. Louisiana, 399 U.S. 30, 34 (1970). The burden is on the State to show an exception exists. Coolidge v. New Hampshire, *supra,* 403 U.S. at 455; Vale v. Louisiana,

supra, 399 U.S. at 34. The exceptions are searches incident to a valid arrest, searches of cars stopped on a road, seizures of evidence in plain view, stop and frisk searches, searches with consent, searches to prevent destruction of evidence, searches to prevent the flight of a criminal, and searches in response to a need for help. *See* Coolidge v. New Hampshire, *supra*, 403 U.S. at 455-473; Vale v. Louisiana, *supra*, 399 U.S. at 34-35; Terry v. Ohio, 392 U.S. 1, 27 (1968); Warden v. Hayden, 387 U.S. 294, 299 (1967); Chapman v. United States, 365 U.S. 610, 615 (1961); McDonald v. United States, 335 U.S. 451, 454-455 (1948).

The State contends that the situation here fits into the need for help or the emergency exception. It contends that the odor of death combined with the defendant's strange behavior and the long absence of defendant's wife and children, as well as his absence at the time of the search, would give probable cause to believe that there was a medical emergency in which someone might be injured and in need of immediate help. This contention is actually two-fold. The State says that probable cause to believe that a crime has been committed and that someone may be hurt because of it justifies a warrantless search. Also, the bare probable cause to believe someone is hurt, regardless of lack of probable cause to believe a crime caused it, justifies a warrantless search.

The Supreme Court of the United States has held reasonable a warrantless search in the first kind of emergency situation, as when a police officer hears a shot and a cry for help. McDonald v. United States, *supra*, 335 U.S. at 454. For a discussion of the emergency doctrine and its history see State v. Sutton, 454 S.W.2d 481 (Mo.

banc 1972).[1] *See also*, Wayne v. United States, 318 F.2d 205, 211-214 (D.C. Cir. 1963). It has been persuasively stated that whenever the police have reliable information of a death an emergency exists sufficient to warrant an immediate search because apparent death may turn out to be a barely surviving life, still able to be saved. Patrick v. State, 227 A.2d 486, 489 [3-9] (Del. 1967). Our Supreme Court has adopted the emergency exception on facts dissimilar to those here presented. State v. Miller, 486 S.W.2d 435 (Mo. 1972).

The defendant in his brief places a great deal of emphasis on the police officers' belief that no crime had been committed and no emergency existed. The State counters, however, by stating that when it comes to determining the legality of a search the subjective thoughts of the police are irrelevant and only the objective facts within their knowledge as well as reasonable conclusions objectively drawn from them are determinative.

The Supreme Court of the United States has discussed both probable cause and the warrant requirements for searches in terms of an objective standard. It has said that in determining the reasonableness of a particular search, "it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" Terry v. Ohio, *supra*, 392 U.S. 1, 21-22. The court was emphasizing that at some point the

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[1] The search there made was ruled unconstitutional under the facts of the case but it was recognized that Missouri had "the prerogative" to accept that doctrine. Root v. Gauper, 438 F.2d 361, 365 (8th Cir. 1971).

subjective determination by the police that a search is justified must be checked against an objective determination by a court. It was saying subjective good faith alone is not enough; there must also be objective reasonableness.

Many lower federal courts and some state courts have said, sometimes in dicta, that objective reasonableness alone suffices to uphold either an arrest or a search. *See, e.g.*, United States ex rel. LaBelle v. LaVallee, 517 F.2d 750, 754 [7-8] (2d Cir. 1975), cert. denied, 423 U.S. 1062 (1976); United States v. McCoy, 517 F.2d 41, 43 n.1 [1] (7th Cir. 1975), cert. denied, 423 U.S. 895 (1975); United States v. Vital-Padilla, 500 F.2d 641, 644 [2] (9th Cir. 1974); White v. United States, 448 F.2d 250, 254 [5] (8th Cir. 1971), cert. denied, 405 U.S. 926 (1972); Sirimaco v. United States, 315 F.2d 699, 702 [7] (10th Cir. 1963), cert. denied, 374 U.S. 807 (1963); State v. Donnell, 239 N.W.2d 575, 578 [6] (Iowa 1976); Commonwealth v. Miller, 318 N.E.2d 909, 911 [4] (Mass. 1974); Commonwealth v. Donnelly, 336 A.2d 632, 637 [5-6] (Pa.Super. 1975), cert. denied, 424 U.S. 974 (1976). The only cases that disagree with this purely objective standard have done so on the basis that the police officer's subjective motives were bad faith ones in the particular situation. *See, e.g.*, Mills v. Wainwright, 415 F.2d 787, 790 [1] (5th Cir. 1969); Moss v. Cox, 311 F.Supp. 1245, 1251-52 [13-15] (E.D. Vir. 1970). *Contra* United States v. Dunavan, 485 F.2d 201, 205 [4-6] (6th Cir. 1973). This is not a problem here, however, because the officers in this case had a good faith motive of searching for persons missing under unusual circumstances rather than of finding evidence to tie defendant in with a crime or of harassing defendant.

Missouri courts have accepted this objective standard in two cases. State v. Miller, *supra*, 486 S.W.2d 435; State

v. Deffenbaugh, 534 S.W.2d 565, 567-568 [1] (Mo.App. 1976). We believe that these cases, along with the overwhelming agreement by other courts, provides a firm basis for using an objective standard in this case and upholding the officers' initial entry into the defendant's home despite their possible lack of correct subjective motivation. Here, although the odor of decomposing flesh would indicate death of at least one of the persons involved, Fern and the two children were missing under most unusual circumstances and Epperson could not be found. One or more of the remaining three could be in immediate need of help to prevent death.

Furthermore, a careful analysis of the officers' testimony reveals that although they frequently considered this a "missing persons" investigation they also considered the medical emergency factors involved. As Sergeant Duffner testified in response to the question of why he did not get a search warrant:

> "A Well, I really didn't know what I had. I didn't know—I knew the circumstances, that Russell Epperson and his wife were gone, and as far as I was concerned, I was just looking to try to find them to see if they had skipped the country or *they were injured* or what. I didn't really know what I had. I mean there was no indication further to my prior investigation of any foul play involved of [sic] anything. As far as I knew they were just gone wherever they went; I couldn't tell." (Emphasis ours).

Obviously from this response it can readily be found and inferred that Duffner who was in charge of the search considered the probability that someone inside the house might be injured and need emergency aid.

It is clear that once the officers had made a permissible entry into the house under the medical emergency doctrine, they could seize evidence of the crime in the bedroom under the plain view doctrine. The Supreme Court of the United States has said, "Where the initial intrusion that brings the police within plain view of such an article is supported, not by a warrant, but by one of the recognized exceptions to the warrant requirement, the seizure is also legitimate." Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971).

In order to uphold a seizure of evidence under the plain view doctrine, the police must be justified in making their initial intrusion, they must discover the evidence inadvertently rather than by anticipation or by a concerted search, and they must immediately recognize that the objects viewed are evidence of a crime. Coolidge v. New Hampshire, *supra*, 403 U.S. at 465; State v. Dayton, 535 S.W.2d 479, 486 [6-8] (Mo. App. 1976). Here, the officers' initial warrantless entry was justified under the emergency doctrine. They did not search for the evidence in the bedroom nor did they know it would be there. At most, they could expect to find someone hurt or dead but they could not anticipate finding evidence of a crime. Under the emergency doctrine they had a right to look under the sheet to see if the forms under it were those of people still alive. It is then that the other evidence, that is, the bags, sacks and cord, came into plain view and could be seized. As for the bodies themselves, they could be seized because they were the objects of the initial, justifiable emergency search. They immediately recognized that the objects were evidence of a crime. Thus all evidence found in the bedroom was admissible under the plain view doctrine. For a similar decision in another state see Patrick v. State, *supra*, 227 A.2d at 489-90 [9-11].

There is no way, however, that the evidence found in rooms of the house other than the bedroom where the bodies were located can be justified under the plain view doctrine except as they might have been seized in the first search for injured persons. This evidence was found as the result of a concerted search of the rest of the house by the sergeant looking for further evidence of the crime after the original search for possible injured persons by Officer Schindler and Epperson's father. Thus the inadvertence requirement of the plain view doctrine is not met here. On the other hand, if the evidence had been found while Officer Schindler made his previous, cursory search of the house for the defendant, it would have been admissible under the plain view doctrine, for such a cursory search for someone potentially dangerous in a house is allowed and objects in plain view discovered during such a serach are admissible. United States v. Blake, 484 F.2d 50, 57 [7-8] (8th Cir. 1973), cert. denied, 417 U.S. 949 (1974); State v. Dayton, *supra*, 535 S.W.2d at 484-86 [1-4].

No other exceptions so far recognized by the United States Supreme Court fit this situation either. In particular, this additional search was not necessary to prevent the known probable flight of a criminal (here, the defendant). It is true the defendant's location on the morning of March 26 was unknown at the time of the search. But he had been seen in his house earlier that morning. All his vehicles were accounted for. The fact of there being camping equipment, groceries, etc., in one of the family vehicles cannot be relied on because the police didn't notice this until after the search. Moreover, if anything, there was evidence the defendant was going to stay around since he had already done that despite enough time having passed for the victims to be missing several days and for a body to decompose some. Certainly there is little simil-

arity between this case and the "hot pursuit" case of Warden v. Hayden, *supra*, 387 U.S. 294.

There are, however, numerous cases in which other courts have upheld warrantless searches at the scene of homicides even in the absence of specific facts showing likely flight of the criminal or other usually recognized exigent circumstances. *See, e.g.*, United States v. Birrell, 470 F.2d 113, 116-17 [6] (2d Cir. 1972); United States v. Keeble, 459 F.2d 757, 762 [6] (8th Cir. 1972), reversed on other grounds, 412 U.S. 205 (1973); Brown v. Jones, 407 F. Supp. 686, 691 [8] (W.D. Texas 1974); affirmed per curiam, 526 F.2d 1391 (5th Cir. 1976); State v. Sample, 489 P.2d 44, 46-47 [2] (Ariz. 1971); State v. Chapman, 250 A.2d 203, 208-11 [3-6] (Me. 1969); People v. Neulist, 43 A.D.2d 150, 350 N.Y.S.2d 178, 183-85 [2-5] (1973); Brown v. State, 475 S.W.2d 938, 948-50 [11,12] (Tex. App. 1971). The rationale of these decisions has been the great need to protect society from murderers, the need to protect against any possible flight of the criminal, and the pointlessness of requiring a warrant. United States v. Birrell, *supra*, at 117; Brown v. Jones, *supra*, at 691; State v. Sample, *supra*, at 47.

This relatively new exception is not based on the usual finding of specific facts that flight is likely but is based on a general recognition of the seriousness of the crime and the overwhelming need to protect society against its perpetrators. Not all courts agree such an exception is constitutionally permissible. *See, e.g.*, Sample v. Eyman, 469 F.2d 819, 821-22 [6] (9th Cir. 1972) (overturning conviction in State v. Sample, *supra*); People v. Williams, 557 P.2d 399, 403-05 [1-5] (Colo. 1976); State v. Brothers, 478 P.2d 442 (Ore.App. 1970). One court has tried to reconcile two of the conflicting opinions on this

question by upholding a warrantless search of a murder scene only if made contemporaneously with the discovery of the body. *See* State v. Duke, 518 P.2d 570, 574 [3] (Ariz. 1974) (distinguishing State v. Sample, *supra*).

It is on this exception that this case can be differentiated from Root v. Gauper, *supra*, 438 F.2d 361, (overturning conviction in State v. Sutton, *supra*, 454 S.W.2d 481). In that case the search took place after the body was removed from the scene. Here, it took place immediately upon discovery of the bodies. Also, in Root v. Gauper, the court did not have, as here, a situation in which the initial entry was justified on another basis and only an additional search was in question under the homicide scene exception. There, the initial search was not able to be justified under the emergency or other doctrine.[2]

We find those cases upholding the homicide scene exception to warrantless searches most persuasive and in this situation, we believe it applicable to uphold the search of the other rooms of defendant's house. Under this exception all evidence pertaining to the warrantless search of defendant's house was admissible.

No decision of our Supreme Court, however, has adopted this exception to validate a warrantless search. Because this issue involves an interpretation of a provision of the Constitution of the United States and the Constitution of Missouri which has not been previously construed, the Supreme Court of Missouri has exclusive jurisdiction of this appeal under Article V, Section 3, Missouri Constitution, as amended 1970. City of St. Louis v. Tinker, 542 S.W.2d 512, 513 [1] (Mo.banc 1976).

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[2] In Root v. Gauper, the homicide scene doctrine was apparently not advanced to justify the initial intrusion.

In accordance with Article V, Section 10, Missouri Constitution, as amended 1970, this case is transferred to the Supreme Court of Missouri.

/s/ Harry L. C. Weier

HARRY L. C. WEIER, JUDGE

John J. Kelly, Jr.	Presiding Judge	concurs
George F. Gunn, Jr.	Judge	concurs

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1310

RUSSELL LEE EPPERSON,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

Petitioner was convicted of three counts of murder in the first degree in the killing of his wife, Fern, and his two children, Richard and DeAnn. The jury assessed punishment on each count at life imprisonment and the court ordered the sentences to run consecutively. The conviction was obtained in the Hannibal Court of Common Pleas after a change of venue from the Circuit Court of Audrain County. The convictions arose from the following events:

Petitioner lived with his wife, Fern, and their two children at 608 West Pearson in Mexico, Missouri. On March 24, 1975, Fern's mother, Mrs. Mary Ann Smith, attempted to telephone her daughter at her home. Mrs. Smith called petitioner at his job inquiring about the whereabouts of her daughter. He told her that she and the children had gone to Columbia to do some shopping. This was unusual because Fern usually left the children with Mrs. Smith when she went shopping. The next day, Mrs. Smith tried calling her daughter at home again but received no answer. That evening she and her husband saw petitioner on the town square in Mexico. He told them that Fern was with his mother. However, after Mrs. Smith informed him that Fern and the children were not with his mother, he said that he did not know where they were. After Mrs. Smith went home, she received a call from petitioner who told her that Fern had telephoned him and told him that she would be home in the morning with the children.

On March 26, 1976, at approximately 8:30 a.m., petitioner called Mrs. Smith on the telephone and asked her to come over to his house. She refused at first but then agreed to come. Petitioner informed her that Fern would be there about 9:00 o'clock. At 8:45 a.m., petitioner picked up Mrs. Smith in his pickup truck and took her to his home at 608 West Pearson. As she and the petitioner went into the home, he removed something from a cabinet and kept it behind him while he locked the kitchen door. He then stood against the door facing Mrs. Smith. Petitioner asked Mrs. Smith to go into the living room and told her several times that he would be glad when this was all over. Mrs. Smith spotted her daughter's purse on the dryer and remembered that Fern never left the house without it. Mrs. Smith also smelled a strong sweet odor which she associated with death. After making up

an excuse, she left the house and went to the residence of a neighbor, Mrs. Gloria Mitchell, where someone called the police.

Officer William Schindler of the Mexico Public Safety Department responded to the call and met Mrs. Smith at 810 North Wade, the home of Gloria Mitchell. Mrs. Smith related to Officer Schindler the facts and events described above. Officer Schindler summoned Sergeant Duffner and told him what Mrs. Smith had related. This occurred at 9:34 a.m. While Officer Schindler testified at the hearing on the motion to suppress that Mrs. Smith did not tell him about the odor of death, Mrs. Smith testified that she did tell him. Sergeant Richard Duffner testified that Officer Schindler related to him later that morning that Mrs. Smith had told him about the odor.

Both officers went to 608 West Pearson, knocked on the doors without getting a response, and found that all the windows were covered with drapes or blinds. Sergeant Duffner returned to the police station having ordered Officer Schindler to remain near the house in order to observe if anyone left or entered it. After returning to the police station, Sergeant Duffner commenced an investigation which began with his talking to petitioner's next door neighbor. He learned from her the places of employment of petitioner and his wife and the school in which petitioner's son, Richard, was enrolled. Sergeant Duffner determined that Fern Epperson had been on vacation that week but had not shown up for bowling on Tuesday evening as she usually did. He also discovered from petitioner's employer that petitioner had stated the day before that he had taken his wife to the hospital for Xrays. A call to the Eppersons' family doctor revealed that he had not seen her since December, 1974. The personnel of the school in which Richard Epperson was enrolled

told Sergeant Duffner that a person identifying himself as Russell Epperson had called the school Monday and told them that his son Richard would be absent because of illness. Sergeant Duffner informed Officer Schindler and the chief of police of the results of his investigation. The chief ordered Sergeant Duffner to get in touch with petitioner's parents to find out if they had seen petitioner or to request them to come to the house. The sergeant arranged to meet the parents at petitioner's home. He then stopped by to talk to Mrs. Smith and was informed by her that the local hospital had no record of Fern's having had Xrays.

Sergeant Duffner and Officer Schindler met petitioner's parents at 608 West Pearson shortly thereafter and again failed to get a response by knocking on the doors. Petitioner's father, hereafter referred to as Mr. Epperson, told them that he did not see petitioner's motorcycle there and that he might be riding around on it. After telling the police officers that they would not break into their son's house, the Eppersons went to the home of Mrs. Mitchell, where Mrs. Smith still was present. Officer Schindler then went to the police department where he found out by means of a telephone call that petitioner's motorcycle was found at his place of employment. The chief of police had previously told Duffner and Schindler that they could not break into the house themselves but that perhaps Mr. Epperson could. Officer Schindler called Mr. Epperson at the Mitchell residence and told him about locating the motorcycle without having located the petitioner. Epperson told Schindler that he would give them some help in entering the house. After the telephone call, Mrs. Mitchell heard Mr. Epperson tell them that they had to go and try to get in because if anything had happened his son might be dead also.

The Eppersons and Diffner and Schindler met again at petitioner's home. Petitioner's car and truck were also there. The officers told the Eppersons that if there would be any breaking into the house they should be the ones to initiate the action. Mr. Epperson agreed to help. Mr. Epperson unsuccessfully tried to open the doors with his key and then with a screwdriver. One of the police officers noticed that a window in the south side of the house was unlocked. After Sergeant Duffner got a Phillips screwdriver from petitioner's garage, Mr. Epperson used the screwdriver to take the screws out of the storm window as the officers assisted him by holding the window. All of them helped raise the window and Officer Schindler noticed the odor of decomposing flesh as soon as the window was raised. After a ladder was placed against the window, they pulled the blinds back and saw a human form lying under a sheet on the bed. Mr. Epperson entered the room through the window first with Schindler and Duffner following. The entry was around noon.

The form on the bed appeared to be a body with the sheet pulled up to the back of the head. While Officer Schindler and Mr. Epperson went to the other parts of the house to see if anybody else was there, Sergeant Duffner removed the sheet from the form and discovered the bodies of a nude adult female with two children lying across her back. He showed what he had found to the other two men. The female, Fern Epperson, was lying face down on the bed and the children had nightclothes on and two white plastic bags over their heads. The male child had a cord tied around his neck. A sock was found by Fern's face and another sock was found in the plastic bag over the female child's head. There were no indications of struggle or forced entry.

Sergeant Duffner called his superior officers and then made an investigation of the house. As he walked through the house, he found a five-gallon can of gasoline in the hallway near the bedroom where the bodies were found; he found a chisel for an air hammer partly wrapped in towels in a chair in the living room; and, he found a bottle of chloroform on top of the sewing cabinet in the kitchen. In the Cadillac parked near the house he observed groceries, camping equipment and automobile equipment.

That afternoon a search was begun for the petitioner in the City of Mexico. The search eventually extended throughout Audrain County and several of the surrounding counties. Petitioner was arrested on April 4, 1975, after his father called the sheriff's department and announced that his son was at his house and ready to give himself up.

Tests later revealed that the bottle found in the kitchen of the Epperson home did indeed contain chloroform, as did the socks which were found next to the mother and daughter. Chloroform was also found in the vital organs of the victims. The bodies had been dead for 30 to 72 hours before the autopsies were performed at 5:00 p.m. on March 26, 1975. The bodies showed evidence of blows by a blunt instrument on the head and shoulders, with the male child having suffered a skull fracture from the blows. Fern's cause of death was diagnosed as asphyxia due to the administration of chloroform and smothering, and blows from a blunt object. The male child was found to have died by strangulation from the cord around his neck, from probable smothering by the plastic bag and from the skull fracture. The female child was killed by asphyxia due to the administration of chloroform and smothering by the plastic bag.

A motion to suppress all of the evidence gained as the result of the entry of petitioner's home was filed, and a hearing was held before the Honorable George P. Adams. In addition to the testimony which has been described above, Mr. Epperson stated that he had given no permission for the officers to enter his son's home nor had he voluntarily assisted them. This testimony was despite Mr. Epperson's previous statement given to a police officer on March 26, 1976, in which he stated that he assisted police officers after his wife and Mrs. Smith decided that the house should be broken into. Sergeant Duffner testified that they did not get a search warrant because there was no indication of "foul play". Before entering the home, he had known of no crime which had been committed. Officer Schindler also testified that he had had no idea that a crime had been committed and that he had not been alarmed by anything before entering the house.

The motion to suppress was overruled.

Petitioner entered a plea of not guilty by reason of mental disease or defect, and was found by the circuit court to be competent to stand trial. After psychiatric examinations of petitioner were completed, he withdrew his plea prior to trial and entered a plea of not guilty. A rehearing on the motion to suppress was denied by the Honorable James R. Reinhard, who conducted the trial.

At trial, the state presented evidence of the facts as related above. Petitioner rested without presenting any evidence. The jury found petitioner guilty of three counts of murder in the first degree and assessed his punishment on each count at life imprisonment. The Circuit Court ordered that the sentences run consecutively.

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner urges this Court to issue its writ of certiorari for two reasons. First, the medical emergency exception to the Fourth Amendment Search Warrant Requirement has not been clearly delineated or defined by previous United States Supreme Court decisions and, Second, the facts in the instant case do not render the entry into petitioner's home valid as a response to a medical emergency.

It is respondent's position that the medical emergency exception has been sufficiently delineated and recognized by United States Supreme Court opinions to allow it to be applied in an accurate and constitutional manner by lower courts and that the definition of the medical emergency exception is by the nature of its subject matter impossible to delineate more clearly. The right of the police to respond to emergency situations, including medical emergencies, was recognized as well established by the Court in *Mincey* v. *Arizona*, ... U.S. ....., 98 S.Ct. 2408, 2413-2414, 57 L.Ed.2d 290 (1978):

> "We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. Similarly, when the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises . . . . 'The need to protect or preserve life or avoid serious injury is justification for what would otherwise be illegal absent an exigency or emergency.' " [Footnotes and citations omitted]. See also, LaFave, *Search and Seizure*, Section 6.6(a), pp. 467-473.

The formulation which allows police to respond to emergency situations within dwellings without a warrant when there are reasonable grounds to believe that a person is in need of immediate aid in order to protect or preserve life or avoid serious injury is about as precise as is possible given the fact that emergency situations by their very nature are impossible to anticipate. Given the infinitely varying and random circumstances in life, it would be extremely unwise to attempt to further delineate the description given in *Mincey* of the medical emergency exception unless a legitimate instance of such emergency be inadvertently excluded. This same problem was recognized in regard to the entry of burning premises in *Michigan* v. *Tyler*, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978), wherein the Supreme Court recognized that the general rules established in their opinion would have to be applied on a case by case basis by other courts. *Id.* 436 U.S. at 510, note 6. The Court in *Tyler* attempted no further delineation of when officers may enter and search burning or burned premises other than the broad guidelines given in that opinion. Likewise, no such attempt should be made in the instant case. Any attempt made in this case would be strictly limited to the facts of this case and would be of little precedential value.

Petitioner points out no line of cases which deviates from the Supreme Court's *Mincey* formulation of the emergency rule nor does he point out wherein the Supreme Court of Missouri deviated from that rule in the instant case. Indeed, the Supreme Court of Missouri emphasized the fact that the police needed to find that there was someone who was "in need of immediate help" because

of illness or injury and that in the instant case one or more of the victims of the crime could have been in "immediate need of help to prevent death". *State* v. *Epperson*, 571 S.W.2d 260, 264 (Mo. banc 1978).

In summary, as for the need for this Court to issue its writ in order to define or delineate further the medical emergency exception to the Fourth Amendment search warrant requirement, petitioner has failed to make a convincing case that such an endeavor is needed and has failed to indicate that such would change the analysis utilized by the Supreme Court of Missouri in the instant case.

Petitioner insists, however, that the medical emergency exception, however defined, should not apply to the facts in the instant case because there were no facts within the knowledge of the officers which were sufficient to sustain a reasonable basis that a medical emergency existed and because the officers had concluded that no emergency did exist.[1] Essentially, the facts within the knowledge of the officers are as summarized by the Supreme Court of Missouri:

> "These facts include (1) the defendant's wife and children had been missing several days; (2) defendant had given false and inconsistent explanations [to various persons] for their absence; (3) defendant's unusual, suspicious and nervous manner in the days following the disappearance of his family; (4) an odor of decomposing flesh had been detected in the house,[2] and (5) defendant's unexplained disappearance, though he had been in the house with Mrs. Smith shortly before the police arrived." *State* v. *Epperson, supra*, at 263.

1. During oral argument before the Missouri Supreme Court, petitioner's counsel stated, after describing the information before the officers, "Had there been a search warrant I certainly don't think that I'd be here making any argument that he hadn't had probable cause to obtain a search warrant with that kind of information." He modified this somewhat by stating later that this was not a case presenting a "glaring" set of facts for an emergency. Even though a transcript of the oral argument has not been prepared by that Court, respondent's counsel vouches for the accuracy of the statements as having been at the argument and as having listened to them on the tapes of the argument recorded by the Court.

These facts had also led Epperson's mother and father to conclude, immediately before deciding to go into the house, that if something terrible had happened to the rest of the family then "Russell was dead also." Mr. Epperson later denied saying this.

As pointed out by the Supreme Court of Missouri, these facts are remarkably similar to the facts in the numerous cases cited in *State* v. *Epperson, supra*, at 264, in which it was found that the facts presented a reasonable basis for concluding that there was a medical emergency justifying officers entering a premises without a warrant. Petitioner cites no cases which have, on similar facts, failed to uphold a warrantless entry. Petitioner argues that, because the police delayed several hours before entering the premises, this reenforces petitioner's contention that there was no true emergency. He fails to allude to the fact that the several hours delay was caused by the police officers investigating the whereabouts of Mrs. Epperson and her children as well as of petitioner, which investigation revealed facts further establishing the suspicious nature of the family's disappearance and of petitioner's recent ac-

2. The assertion is made on page four of the petition for writ of certiorari that Mrs. Smith, Fern Epperson's mother, had told Officer Schindler that she had smelled the odor of rotting flesh when in the house that morning but that Officer Schindler denied that he had been told about the unusual odor. Petitioner, however, fails to fully describe the testimony at the suppression hearing. Sergeant Richard Duffner testified that Officer Schindler had in fact related to him that same morning that Mrs. Smith had told him about the odor of death.

tions. It was then that many of the inconsistencies involved in petitioner's previous explanations about the whereabouts of his family and his own lack of availability at his usual place of employment became apparent. It was these additional factors as well as the factors that were already within the officers' knowledge that the Supreme Court of Missouri relied on in concluding that there was a reasonable basis for the officers to have believed that a medical emergency existed at the time that they and Epperson's father broke into the house. This two hour period, then, unearthed facts and circumstances which formed a part of the basis for entry. The implication urged by petitioner that this was a period of several hours in which nothing was done is erroneous.

The question presented by appellant for review involves only the entry of the premises and does not extend to the finding of the bodies or the subsequent observations by one of the police officers in which he found, in plain view, the instrumentalities of the crime and which resulted in photographs being taken. The finding of the items additional to the bodies also does not seem to be a subsidiary question presented by the petitioner since, as analyzed by the Supreme Court of Missouri, it was simply a continuation of the medical emergency circumstance which justified the initial entry.[3] See *Michigan* v. *Tyler, supra.* None of the egregious circumstances which existed either in those searches in *Tyler* which occurred more than a day after the fire and those searches in *Mincey* which occurred over a several day period and involved ripping up the residence are found in the instant case. Here, appellant's where-

3. In fact during oral argument before the Supreme Court of Missouri petitioner's attorney stated that this further "search" was justified if the initial entry was. Even though no transcript was prepared of the oral argument, counsel for respondent was present then and has listened to the Court's tapes of the argument to insure the accuracy of this assertion.

abouts had not been determined nor had it been determined that there was evidence in the house which was safe from removal or destruction. The officer was certainly justified in looking for evidence, such as the instrumentalities of the crime which he found, in view of the fact that people would be coming to take the bodies to either the hospital or funeral home and that other people would also be present in the house who may inadvertently or deliberately remove or destroy evidence. Because this is not a question presented by the petitioner, respondent will not engage in a more thorough discussion of it.

The third question addressed by the Missouri Supreme Court, concerning the subjective conclusion of the police officers that no reasonable basis existed indicating a medical emergency, is not explicitly presented as a question for review by a petitioner. Although he alludes to the fact that the officers did not conclude that a medical emergency existed, this fact is used to corroborate his own assertion that the facts presented by the case cannot serve as a reasonable basis for the medical emergency exception. However, this question might be one which this Court would treat as a subsidiary question of the issue presented for review. Numerous other courts have considered it necessary to determine whether the subjective erroneous determination of the police officers concerning the legality of a search or arrest is controlling on the reviewing court or whether an objective test should be applied. Therefore, respondent will treat this as a subsidary question.

Respondent contends that the issue of whether or not the subjective determination by the police officers on whether or not a medical emergency existed should be binding on a reviewing court should not be the basis for the issuance of the writ of certiorari since the Supreme Court of Missouri's decision was based upon and in ac-

cordance with principles firmly established by this Court. The Supreme Court of Missouri held that "objective reasons alone suffice to uphold either an arrest or a search" unless "the police officers' subjective motives were demonstrably in bad faith." *State* v. *Epperson, supra,* at 265. While there is no United States Supreme Court case in which a subjective decision by officers as to the lack of justification for a search or arrest has been ignored in favor of justifying their actions on objective grounds, the Missouri Supreme Court's position is in accord with applicable decisions by this Court in which this Court set forth an objective standard to be used to review officers' actions. In *Terry* v. *Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) this Court held that the reasonableness of a particular search should be judged against an objective standard, that is,

> "would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Id.* 392 U.S. at 21-22.

Other jurisdictions which have considered the question have, practically unanimously, relied on the language in *Terry* or on similar language in other United States Supreme Court cases to uphold arrests and searches made despite subjective determinations by police officers which could not have supported their actions. *Klingler* v. *United States,* 409 F.2d 299, 304-305 (8th Cir. 1969); *cert. denied,* 396 U.S. 859 (1969); *State* v. *Vanzant,* 14 Wash. App. 679, 544 P.2d 786, 788 (1975); *Payne* v. *United States,* 111 U.S. App. D.C. 94, 294 F.2d 723, 725 (1961); *cert. denied,* 368 U.S. 883 (1961); *United States ex rel. Senk* v. *Brierly,* 381 F.Supp. 447, 463 (M.D.Penn. 1974); *affirmed without opinion,* 511 F.2d 1396 (3rd Cir. 1975); *cert. denied,* 423 U.S. 843 (1975); *United States* v. *Carr,* 445 F.Supp. 1383,

1386-1387 (D.Con. 1978), and authorities cited therein. Similar holdings from numerous jurisdictions will be found in Appendix A of this response. Commentators have also adopted this as the correct view. See LaFave, *Search and Seizure,* §3.2, pages 460-461.

Such a universal interpretation of United States Supreme Court opinions show that the writ should not be issued to review this question because the law of this Court is being uniformly interpreted and applied by the federal and state jurisdictions throughout this country. In fact, petitioner never directly attacks the validity of the Missouri Supreme Court's holding on this issue nor does he cite contrary authority.

CONCLUSION

WHEREFORE, respondent respectfully requests that this Court deny the petition for writ of certiorari to the Missouri Supreme Court.

Respectfully submitted,

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APPENDIX A

Decisions approving the principle that the subjective determination by the police officer that probable cause for an arrest or search did not exist is not binding on the reviewing court are as follows:

United States ex rel. LaBelle v. *LaVallee*, 517 F.2d 750, 754 (2nd Cir. 1975); *cert. denied*, 423 U.S. 1062 (1976);

United States v. *Day*, 455 F.2d 454, 456 (3rd Cir. 1972);

State in Interest of J. B., 131 N.J. Super. 6, 328 A.2d 46, 42 (1974);

State v. *Donnell*, 239 N.W.2d 575, 578 (Ia. 1976).

This principle has also been approved in cases in which a defendant has attacked the legality of the search or arrest on the basis that the officer did not later testify as to which theory he was basing his actions on.

Dodd v. *Beto*, 435 F.2d 868, 870 (5th Cir. 1970); *cert. denied*, 404 U.S. 845 (1971);

Guzman v. *Estelle*, 493 F.2d 532, 536 (5th Cir. 1974);

Commonwealth v. *Donnelly*, 233 Pa.Super. 396, 336 A.2d 632, 637 Note 3 (1975); *cert. denied*, 424 U.S. 974 (1976).

For decisions upholding this principle on the basis that it was amenable with the rationale behind the Fourth Amendment exclusionary rule, see the following:

State v. *Zito*, 54 N.J. 206, 254 A.2d 769, 771-772 (1969);

United States v. *Darrow*, 499 F.2d 64, 69 (7th Cir. 1974); *cert. denied*, 419 U.S. 1013 (1974).

The following cases stand for the application of this principle to situations in which police officers acted, or the court assumed they acted, on erroneous conclusions as to the extent of their authority to arrest or search:

United States v. *Imbruglia*, 397 F.Supp. 1206 (D.Mass. 1975);

United States v. *Vital-Padilla*, 500 F.2d 641, 644 (9th Cir. 1974);

United States v. *Gilbert*, 378 F.Supp. 82, 87 (D.S.D. 1974);

Bailey v. *United States*, 279 A.2d 508, 511 (D.C.Ct.App. 1971).

Relying on the above principle, the following cases have held that a search of an automobile which would have been justified without a warrant was not rendered invalid simply because the officers relied on a legally insufficient warrant:

United States v. *Darrow*, 499 F.2d 64, 69 (7th Cir. 1974); *cert. den.*, 419 U.S. 1013 (1974);

White v. *United States*, 448 F.2d 250, 254 (8th Cir. 1971); *cert. den.*, 405 U.S. 926 (1972).

The courts in the following opinions have found that an arrest or search is not illegal simply because the determination of probable cause by the officer was partially the result of his considering illegal factors if other facts within his knowledge would also have established probable cause:

Smith v. *United States*, 402 F.2d 771, 772 (9th Cir. 1968);

United States v. *Skinner*, 412 F.2d 98, 102 (8th Cir. 1969); *cert. den.*, 396 U.S. 967 (1969);

State v. *Waltz*, 61 N.J. 83, 293 A.2d 167, 170 (1972).

Courts also have found that a warrantless arrest made on a misdemeanor charge which would call for the authority of a warrant would not be rendered invalid if there was probable cause to believe that a felony had been committed which would not require the authority of a warrant:

State v. *Zito*, 54 N.J. 206, 254 A.2d 769, 771-772 (1969);

United States v. *Rickus*, 351 F.Supp. 1379, 1382 (E.D. Pa. 1972); *affirmed*, 480 F.2d 919 (3rd Cir. 1973); *cert. den.*, 414 U.S. 1006 (1973).

Courts have also upheld searches and arrests because there were facts within the knowledge of arresting officers which would have justified arrests on legal grounds even though the grounds stated at the time of the action by the officers did not provide legal justification:

Commonwealth v. *Miller*, 318 N.E.2d 909, 911 (Mass. 1974);

United States v. *McCoy*, 517 F.2d 41, 43, n. 1 (7th Cir. 1975); *cert. den.*, 423 U.S. 895 (1975);

State v. *Wade*, 206 Kan. 347, 479 P.2d 811, 813 (Kan. 1971);

State v. *Spry*, 87 S.D. 318, 207 N.W.2d 504, 509 (1973);

United States v. *Dunavan*, 485 F.2d 201, 205 (6th Cir. 1973).

See also, *Sirimarco* v. *United States*, 315 F.2d 699, 702 (10th Cir. 1963); *cert. den.*, 374 U.S. 807 (1963); for the following proposition:

> "A lawful search, though not made under subjective claim or knowledge of right, remains lawful and evidence so obtained is admissible."